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108-105

UNITED STATES SUPREME COURT

No. 1017.

JOHN CROSSLEY & SONS, PLAINTIFF IN ERROR.

versus

HENRIETTA DAVIDSON, ET ALS., DEFENDANT IN ERROR.

Brief of the Plaintiff in Error, on the motion of Defendants in Error, to dismiss or affirm.

Henry C Miller

MILLER & FINNEY,
Of Counsel for Plaintiffs in Error.

L. Graham & Son, Print, 127 Gravier Street.

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STATEMENT OF FACTS.

In 1858, the Legislature of Louisiana, passed an act providing for the drainage of New Orleans. The Act divided the lands to be drained into three drainage districts, appointed commissioners of drainage, provided that a plan should be made exhibiting the lands to be drained, and the names of the proprietors, that the plan should be deposited in the office of the Recorder of Mortgates, and notices given by publication, that the commissioners would proceed to drain the lands, defining the limits of the lands, stating the time within which the draining would be completed, and exhibiting the probable cost of the work; the act further provided that on petition to the District Court, and on proof of publication of notices, there should be the decree that the lands were subject to a first mortgage lien and privilege to secure the assessments for drainage, which, by the act, the commissioners were authorized to levy on the lands, and the act declared the assessment should be recoverable before any Court of ordinary jurisdiction. The material parts of this act are printed in the appendix.

Acts 1858, pp. 114, 115, 116, et seq.

In 1861 the Legislature passed another act providing a sum-

mary mode for collecting these drainage assessments. It enacted, that whenever the assessments for the expenses of drainage were made, a copy should be filed in the Court designated by the act, that the assessments should set forth the property assessed, names of owners thereon or unknown, that notices in a prescribed form should be given to all parties interested of the filing of suit roll, and that after the expiration of the delays of notice, judgment should be rendered, which should bind *the property assessed and the owners thereof* for the amounts against them, exhibited by the assessments. This statute is printed in the appendix.

See acts of 1861, No. 57, p. 43.

Under these acts, an assessment was made upon the property of the estate of John Davidson, within one of these drainage districts, for the sum of forty-one thousand one hundred and eighty-two 30-100. In the due course of proceedings prescribed by the act of 1861 this assessment ripened into a judgment against the estate and against the property; this judgment was carried by appeal to the Supreme Court of the State, there was affirmed, and on the writ of error to reverse that judgment, sued out by defendants in error in this case, this Court affirmed the judgment of the State Supreme Court.

See Matter of Commissioners of the 1st drainage districts, 27th Louisiana Annual Reports, p. 21.

See Davidson vs. New Orleans, 96 U. S. Reports, p. 97.

In 1871, the State passed another drainage act. It superceded the Commissioners of drainage appointed under previous acts, provided for the continuance of the drainage by the Mississippi and Mexican Gulf Ship Canal Company, provided as the act states, with the requsite machinery to carry on the work. The act directed there should be transfered to the Administrators of the city of New Orleans, all the claims for drainage under the Acts of 1858 and 1861, and assets in the hands of the Commissioners of drainage. The Administrators were charged to collect from the holders of property within the drainage district all the drainage assessments due by them; also to make assessments on those parts of the drainage

districts existing under previous laws, as well as on other lands that might thereafter be added to the drainage districts, at the rate of two mills per superficial foot. For the work to be done by the Mississippi and Mexican Gulf Ship Canal Company, in draining the lands, the act provided that it should be paid from time to time, at the end of each and every month by the Administrators, on production of the certificates from the proper officer the work had been done, the payments to be made at the rate of fifty cents per cubic yard of excavation, and fifty cents per cubic yard of protection levees, and the act devoted all the assets, sources of revenue, including all collections from drainage assessments, under the drainage acts, to the payment of the warrants. In lieu of cash, the drainage work was to be paid in warrants on the city, and to make these warrants valuable and secure their payment to the holders there was in the act the most explicit pledges of all the collections from drainage assessments, of all other property in the hands of the city, derived from the drainage commissioners, and of all sources of revenue. Under the terms of the act, devoting all drainage collections, to the payment of these warrants, the judgment recovered by the city against the defendants an error, was manifestly embraced, with all other claims for drainage, whether in judgment or not. The material parts of this act are also printed on the appendix. See Act 1871, No. 30, p. 75.

In 1876, still another act was passed by the Legislature of Louisiana on the subject of drainage. It authorized the city to contract with the Mississippi and Mexican Gulf Ship Canal Company, and the transferees of that company, for the purchase and settlement of the rights, privileges and franchises arising in favor of the company, under the Act of 1871, to which reference has been made. The act further authorized the purchase by the city from the company of all the boats, implements, machinery, and apparatus belonging to the company. The object of the act was to supercede this Mississippi and Mexican Gulf Ship Canal Company, to confide the work of drainage to the city authorities and to provide the city with

the boats, machinery, tools, etc., possessed by the company, to be bought from the company under the provisions of the act. The price of sale of thisproperty to the city, was provided to be paid in drainage warrants. This act is also printed on the appendix. See Act of 1876, sess act, pp.

After there had been a large issue of warrants, by the city of New Orleans, under these acts of 1871, and of 1876, the legislature enacted acts No. 47 and 67 of 1877, and act No 147 of 1878. These acts evince a disregard of the rights of the holders of the drainage warrants too manifest not to attract attention, by the mere perusal of the statutes.

The act No. 48 of 1877, proposed to exclude from the operation of the drainage acts, a large body of lands embraced in the draining district as defined by the original acts, the act proposed to exempt the lands specified from all future assessment, it proposed to cancel all liens and judgments for draining. It in effect struck out of existence, resources pledged by the contract for the payment of the warrants. See appendix.

The act No. 67 of 1877, (appendix), proposed that no assessment for drainage should be collected, until after there has been benefit conferred in the land. It undertook to limit the assessment to its effect upon the land, and repealed all acts creating a personal liability for drainage assesments. It was deemed an amplification of the act No. 47. Under the original act, the assessments were to be collected at the stated periods to provide funds, to secure the benefit to the land. The theory was the funds should be provided in advance, so as to secure the funds to do the work. It will naturally occur in no other mode, could drainage work be accomplished. The act virtually struck at the assessments out of which the warrants were to be paid. It further undertook to destroy the personal liability of the owners of the land, for the assessments. The act proposed to annul the judgment of the Courts, for drainage assessments by repealing the laws on which the judgments were based. See appendix.

The act No. 147 of 1877, again enacted that all lands should be exempted from drainage assessment, by reason of taxes for

drainage assessments already paid. It declared all judgments for assessments on said lands should be annulled. The ground of objection to the drainage assesment is noticed and discarded in the decision in 27th Louisiana Ann. p. 27 Also in the decision of this court in 96th U. S., 106.

The present suit was brought after the passage of the acts of 1877 and of 1878, by the testementary executrix of John Davidson, his widow and heirs. There had been a final judgment in the State Court, adjudging their liability and of their property, as already stated, for the drainage assessment of $41,182 30. On their writ of error this Court had determined there was no error in that judgment. 96 U. S., p. 97. But after all this, they brought a suit to enjoin the execution of the judgment. They averred in substance in their petition for injunction and that the assessments for drainage imposed on their property, was in excess of the amount necessary to do the work, that the assessment was to be upon the superficial foot, and the rate enforced was not by the superficial foot, nor uniform, but variant in the different districts; that no work was done, save in the First and Second districts, that the Commissioners had collected more than $350,000 in the First district; that the district was not drained, and it was averred that the assessments were restricted by the act to $350,000. The petition further averred, that the only basis for the assessments was the supposed benefit to the lands by drainage, so as to be increased in value to the extent of the assessment; the petition averred the abandonment of the drainage, the insolvency and forfeiture of the charter of the Mississippi and Mexican Gulf Company, of its assignee, of the city, the removal and advertisement for sale of the dredge boats, and the inability of the city, the company, and the assignee to on and complete the work. The petition charged that the act of 1876, to which reference has been made (see Appendix) was a recognition that the drainage had failed, been abandoned; that most of the lands could not be drained, except at a cost exceeding their value, and that the only valuable part of the lands was drained naturally. The petition then sets up

the legislation of 1877, by which it is proposed to repeal all laws for the drainage of lands within certain limits, specified in that act and in the petition; it is alleged that petitioner's land lies within said limits; that it has never been drained, and then the petition refers to the judgment against the petitioners for the assessment for drainage; to enforce which, or any claim for drainage against it, it is charged would be against equity and good conscience, in effect would take petitioner's property, not only without compensation, but for no purpose of public good; and would, also, be contrary to the act No. 67, of 1877, as well as against the act of 1858. The petition proceeds, in its amplification of these grounds for injunction, with the additional averment that in one of the districts, in which the lands had been drained, assessment in full had been paid; that all lands of petitioner in the First District, between the Mississippi river and the ridge, had been drained, the expense paid under the previous act of 1865; that no benefit can accrue to lands south-east of the Metarie ridge, that more than enough money had been paid to the drainage commissioners to pay for all the work honestly and fairly done; that settlement for work had been made in bonds, for which the petitioners property throughout the city had been unequally taxed, that is the compiaint, that petitioners were required to pay an unjust claim twice. It is further charged, that but three thousand dollars in drainage warrants have been issued for work in the first drainage district; that the city has received in cash over seventy-five thousand dollars from property in the first drainage districts; holds property taken for drainage assessments bought at the price of $167,605. This petition closes with a prayer for an injunction of the judgment against the petitioenrs, from enforcing any privllege or claims for drainage, decreeing that the city has sold no claim or privilege, etc.

See petition printed in the brief for defendants in error, ppr. 9-16.

The petition was answered by the city, denying its allegations generally and in detail, in so far as the allegations drew

in question the validity of the drainage assessments, and the validity of the judgment recovered by the City against the petitioners, affirmed by the Supreme Court of the State as well as by this court. The answer pleaded that judgment, as *res judicata* to the demand of petitioners, and the answer specially pleaded that the Acts of 1877 and 1878, proposing to repeal the drainage laws, to cancel all claims for drainage assessments, and all judgments, mortgages and privileges for drainage, were null and void, because of their repugnancy to the articles of the Constitution of the United States as well as of the State prohibiting all legislation impairing the obligations of contracts. See answer, brief of defendant in error, pp. 18 to 23.

In this Injunction suit brought by defendants in error, John Crossly & Sons, limited, of Halifax, England, became intervenors, according to the Louisiana Code of Practice, Article 389; they joined the city in resisting the demand of the petitioners; they averred they were holders of six hundred thousand dollars of drainage warrants, issued under the act of the Legislature, brought to notice of this court, to wit: Act No. 30 of 1871 and Act No. 16 of 1876. They averred they had acquired the warrants for adequate considerations, paid therefor, in good faith and in due course of business. They further aver in their petition, that under and by virtue of the aforesaid statute No. 30, of 1871, and No. 16 of 1876, the entire amount of drainage assessments and drainage taxes judgment, and including the drainage assessment and drainage tax judgment against John Davidson and his succession, were especially set apart as a fund for the payment of all drainage warrants issued and to be issued under the aforesaid laws, including those held by intervenors; that said statutes constitute a contract in favor of intervenors and all holders of the said warrants and every part and portion thereof, and that under and by virtue of the statutes aforesaid, and by reason of the contract then established and created, the aforesaid holder and holders of the drainage warrants aforesaid, including those held by intervenors, acquired a vested right in and to every

part and portion of the aforesaid drainage assessments for the payment of the entire amount of the drainage warrants herein above referred to, and especially that part or portion of the drainage tax judgments as is due and owing by the succession of John Davidson, deceased, and by the plaintiffs herein ; that the abandonment of the drainage work alleged in plaintiffs' petition, and any statute of the State of Louisiana, or any ordinance or resolution of the city of New Orleans, which might authorize an abandment, and any actual abandonment, if permitted to carry with it, directly or indirectly, a cancellation of any part or portion of the drainage tax and drainage tax judgments herein in above particularly referred to, or to relieve the drainage taxpayers' property, in whole or in part, from the payment of the drainage assessments and the drainage tax judgment aforesaid, would impair the obligation of the contract and divest vested rights created and established by the aforesaid laws, No. 30, of 1871, and No. 16, of 1876; that said abandment, and the laws, ordinances, resolutions, and acts authorizing the same, are in violation of article 110 of the Constitution of the State of Louisiana for the year 1864, section 10, of the Constitution of the United States, and article 5 of the amendments to that Constitution.

They further pleaded that act 48 and 67, of the session of the Legislature of the year 1867, and act 148, of 1878, relied on by plaintiffs in the petition also also impair the obligation of a contract in favor of intervenors, and divest vested rights by them held, and that these laws are in violation of Art. 1, Sec. 0, of the Constitution of the United States, and Art. 5 of the amendments to said Constitution, and article 110 of the Constitution of Louisiana for the year 1868, and must be entirely ignored and disregarded by the court.

The Court thus perceives that the pleadings put at issue, the contract between the city and the holders of drainage warrants, formed by the acts No. 30 of 1871 and No. 16 of 1876, and the competency of the legislation of 1877 and of 1878, which undertook to repeal the laws constituting that contract, and to sweep from the warrant holders the securities

and assets, including the judgment for $41,182 30 against the defendants in error, pledged and devoted by the legislative acts of 1871 and 1876, to the paymant of the warrants held by the intervenors.

The judgment of the District Court of the State was in favor of the petitioners for injunction and against the city of New Orleans and of the intervenors. The judgment overruled the plea of *res judicata* based upon the judgment of the Supreme Court of this State and of this Court, pleaded and relied on by the city and the intervenors, sustained the injunction and awarded judgment in favor of petitioners as prayed for by them.

See judgment of the District Court, its affirmance by the Supreme Court of the State; Rec. pp. 2730 Brief of defenants in error, pp. 27, 30, 41.

This suit of error is prosecuted by the intervenor, John Crossley & Sons, to reverse that judgment.

ARGUMENT.

It cannot be seriously controverted that the act of the Legislature of Louisiana, No. 30 of 1871 (see Appendix), created a contract between the city of New Orleans, and the Mississippi and Mexican Gulf Ship Canal Company, as well as with the holders of all drainage warrants issued under that act. The petition of intervention shows that the intervenors, John Crossly & Sons, are the holders of three hundred thousand dollars of these warrants. See Petitions, Rec., pp. Defendant's brief, p. 24. The intervenors are parties to that contract, as holders of these warrants, quite as effectively as if these names were written in the act. The intervenors acquired the warrants issued originally to the Mississippi and Mexican Gulf Ship Canal Company, in accordance with the provisions of the act.

Under the act of 1871, the Mississippi and Mexican Gulf Ship Canal Company, contracted to excavate and dig canals, in the drainage districts; with the earth the company were to dig protection levees in rear of the city, and all smaller canals and

earthworks required for the drainage of the city. See the second, third, fourth, fifth and other sections of the act, printed in the appendix. The work was deemed one of great importance to the city. The allegations of the petition of the plaintiffs in the Court below, at least, so far as they impugn the drainage scheme, by the allegation that all the lands in the first drainage district were already drained; that no benefit can accrue from drainage of the lands north of the ridge; that most of the land could not be drained; that the only valuable portion is drained naturally, and similar averments, are strangely contrasted with the legislative judgment evinced in the legislation upon that subject, from quite an early period. The earliest statute on the subject is in 1835. Sess. Acts, p. 67. Its preamble announces the practicability, as well as the very, great advantages to be derived to the city from the drainage of the lands, in the rear of the city. The legislation of 1858, of 1861, of 1869, of 1871 and of 1876, all express the legislative judgment in favor of that drainage system, which the defendants in error, now assail to escape drainage assessments, upon their property; to evade the effect of the judgment of the Supreme Court of the State, and of this tribunal giving effect to the drainage assessment against the defendant in error. So much is deemed proper to say with reference to the subject of the contract, embraced in the act of 1871.

That Act of 1871, provided that payment for the excavations, the digging of canals, the making of levees, and other works requisite for the drainage, payments should be made to the Mississippi and Mexican Gulf Canal Company, by the city. The resources provided for these payments, were all the collections of drainage assessments, made under the previous acts of 1858 of 1861, as well as all collections for future drainage assessments authorized by the act to be made. One of these assessments was that against the lands of John Davidson, whose executrix, widow and heirs, are the defendants in error here. The act pledged to the company, besides these drainage warrants, all property possessed by the drain-

age commissioners (whose functions the Act of 1871 superceded), and all other sources of revenue, contemplated by the provisions of the act. From time to time as the drainage work progressed, warrants were to be issued to the company, payable out of the funds in the hands of the City Administrators, arising from drainage assessments, and all other sources, standing to the credit of the company, the previous section having directed that all such funds should be placed by the City to the credit of the Mississippi and Mexican Gulf Ship Canal Company, to be held in trust for the payments to it, provided by the act. Section 9 of act. Here, then, are all the elements of the contract, the parties; the work to be done; the payments for that work in warrants; the assets provided and constituted a trust fund for the payment of those warrants. The plaintiffs in error, stand here as parties to that contract in their capacity of holders of these warrants, insisting upon the contract and to that protection accorded to it, by the Constitution of the United States. The position of the defendants in error, judgment debtors for a drainage assessment pledged by the act of 1871, to the payment of the warrrants, is, that the contract is not to be enforced because the State has so adjudged. It is useless to do more than cite the authorities to show that the Act of 1871, constitutes a contract within the protection of the Constitution of the United States.

U. S. Revised Statutes, § 709.
Dartmouth College Case, 4th Wheaton, p. 519.
Green vs. Biddle, 8th Wheaton, p. 2.
Fletcher vs. Peck, 6th Cranch, p. 133.
1st Kent's Commentaries, § 1, p. 413.

Nor was the act of 1876 (appendix) less a contract, than that of 1871. By that act the City of New Orleans assumed control of the drainage of the city. The act authorizes the City to purchase from the Mississippi and Mexican Gulf Company and its assignee, Van Norden, all the machines, tools, implements, boats, apparatus for drainage, and other property, belonging to the company and requisite for the drainage of the city. The price, fixed at $320,000, as shown by the Record, was

to be paid in warrants, payable out of the drainage assessments, to be issued as soon as the agreement was completed. Here again, are the parties; the subject matter; the consideration furnished by one; the price paid by the other, making all the elements of the contract. The intervenor sues as the holder and owner of three hundred thousand dollars of the warrants issued to the company and Van Norden, its assignee, under this act of 1876. There is pledged by the act, for the payment of these warrants, also these drainage assessments, levied or be levied. The contract formed by this, as well as by the previous act of 1871, was for the payment of the warrants from and out of the drainage assessments, and the taxes levied to pay the same. Each constitutes a contract binding on the City, the State, and in favor of those who acquired the drainage warrants, under and on the faith of the legislative acts. The city was bound to enforce the drainage assessments, by collection of the drainage taxes, to hold and apply the funds thus raised as a trust fund, to pay the warrants issued under the acts. The warrant holders had the right to insist on the enforcement of the assessments, the levy of the taxes, and the faithful application of all the funds thus raised to the satisfaction of the warrants.

Now, what was the scope of the legislation of the State of 1877 and 1878, in respect to the contract of the intervenors, as holders of the drainage warrants. The question need hardly be asked. The perusal of the acts suffice. They proposed to destroy the drainage assessments, and the drainage taxes already levied. They proposed to arrest all further drainage by the city, so that no more assessments or taxes could bel evied. The acts proposed to cancel and erase every mortgage registry on the lands, to secure the assessments and taxes for drainage, imposed on them. The acts proposed to cancel all judgments of the tribunals, for the drainage assessments. In the view of the legislature which enacted this remarkable legislation, it was not for the courts, to decree the rights accruing under the

laws. It was the legislative province, to declare the judgments of the courts void, and not to be enforced. Before the sweep of these acts of 1877, the adjudication of this tribunal, affirming the decree against the defendants in error, pronounced by the Supreme Court of the State, was to have no effect. The writ of error to this court, to reverse the drainage judgment against the defendant in error, had failed. The writ of error was then sought at the hands of the legislature. The reversal of the judgment, is announced in the legislation. The legislation literally strikes at all that constitutes the contract of the intervenors. It enacted that contract shall not be enforced. The securities of the contract are released. Neither personal liability or the liability of the land, shall have recognition, or existence. Drainage assessments, taxes, mortgages, liens and judgments of the past shall be obliterated, nor shall any hereafter be permitted. These intervenors holding $600,000 of these drainage warrants, are told by the acts of 1877, they hold waste paper; that all resources of payment pledged to them by the acts of 1871 and of 1876, have been taken from them by the legislative power. These acts are printed in full in the appendix. The comment upon them might have been spared. They carry their own. The imagination can conceive of no legislation, that more distinctly and boldly assaults rights derived from plain contracts.

The jurisdiction of this Court to review the decision of the State Courts, does not at all depend upon the grounds on which their decision is placed. If it were otherwise, the jurisdiction, perfect by all other tests, would be defeated by the frame of the opinion, brought here for review. In the present case, there are conspicuous, the requisites, to make the case for the writ of error, to this Court. There is the contract between the plaintiff in error and the city of New Orleans, formed by the Legislative acts of 1871 and of 1876. There are the laws of the State, passed subsequent to, and bearing on the contract. It is mild to say, the laws impair the contract. They seek to obliterate the contract. All these laws tend to the same conclusion. Two of them are specially alleged in the pe-

tition of the defendants in error, for the relief sought by them in the State Court. In the issue joined in the State Court, both by the City and by the plaintiff in error, the defence to this legislation, is placed upon the ground, of its clear hostility to the contract clause of the Constitution of the United States. Lastly, there is the decision of the Supreme Court of the State, which declares the contract of the plaintiff in error, incapable of enforcement. It is wholly immaterial in this connection upon what grounds the State decision is placed. The Court will not pause, at least on a motion to dismiss, to determine the influence exerted by the unconstitutional State laws, on that decision the State Court has reached. It is enough that the elements and all of them to make the federal question, were present. It is needless to go further. But it does deserve notice, that the decision deals with the issue of the abandonment of the drainage work, as a ground of the relief, the decision accords. The alleged abandoment is set up as a ground in the petition by defendant in error below. The connection between the abandonment of the work which the decision supposes, and the unconstitutional laws of the State which in effect commanded that abandonment is too obvious to need comment. The decision in this aspect, is based upon an alleged abandonment, which the unconstitutional State laws were certainly designed to produce. See Acts of 1877. It is not perceptibly different from a decision in express terms, based directly upon the laws. The decision is in the brief of defendant at error, pp. 30 to 41. The authorities leave no room toquestion the jurisdiction of this court, with respect to this decision.

See Revised Statues of the United States Section.
Wright vs. Nagle, 101 U. S. 791.
University vs. People, 99th U. S., 309.
Bridge Proprietors vs. Hoboken Cy., 1 Wallace Rep., p. 116.
United States vs. Birmingham Bridge, 3d Wall, p. 51.
Wright vs. Nagle, 101 U. S., p. 791.

It deserves mention that prior to the decision brought here

for review, the validity of this contract had been the subject of decision in the State Court. The rights of those claiming under the contract, had been affirmed. Not only had the State Court passed on the subject in the case, reviewed here and reported in 96th U. S. p. 106, but in the subsequent case the decision in which will be found in 30th Louisiana Annual Report, p. 1375. The present decision, the subject of this writ of error, if it stands, deprives the plaintiff in error of the protection of these former decisions. A review of those decisions will still more clearly develope the character of this controversy, and that it involves the federal question arising on the contract and its impairment.

There is another ground.—The plaintiffs in error relied in the State Court upon the decision of this Court in the previous litigation, between the city and the defendants in error. 96th U. S. p. 106. That decision ought to have ended the controversy. It seems to have been ineffective, so far. When that decision was presumed, and there remained nothing but to enforce the judgment of the State Court which the decision affirmed, the result produced was not payment, but the injunction suit of these defendants in error. As to them, nothing had been determined. The door was open to them for fresh litigation. *Res judicata* had no significance. In vain it was urged against them, that all the defences urged by them, were to be deemed concluded by the decisions rendered. See answer and intervention of the plaintiffs in error, printed in brief of defendants in error, pp. 18, 25. It might be urged here, that the defences certainly were concluded. But is enough on the question of jurisdiction, that the plaintiffs in error relied in the State Court upon the decision of this Court, as *res judicata* in their favor, and the decision refused that protection. Plaintiffs in Error claimed a right, under the authority of the United States, i. e., based on a judgment of this Court.

See Clements vs. Berry, 11 How., p. 397.

Pengent vs. Eaton, 15th Wall., p. 3.
Tyler vs. Maguire, 17th Wall., p. 253.
Dupasseur vs. Rochereau, 21 Wall., p. 130.

That judgment, too, was property. The interest of these plaintiffs in Court in that judgment and in its enforcement is obvious. The State Legislature of 1877 seeks to destroy that judgment. It is legislation in clear conflict with the 14th Amendment of the State Constitution, which securles the right of property, from invasion by a State. That ground would be enough, if none other, to give this Court jurisdiction. The jurisdiction exists on all the grounds contended.

The plaintiffs in error respectfully submit the motion should be dismissed.

Henry C Miller

MILLER & FINNEY,
Of Counsel for Plaintiffs in Error.

APPENDIX.

THE ACT NO. 165 OF 1858. SESS. ACTS, P. 114.

To Provide for Leveeing, Draining and Reclaiming Swamp Lands in Certain Portions of the Parishes of Orleans and Jefferson.

Section 1st. Be it enacted by the Senate and the House of Representatives of the State of Louisiana, in general assembly convened, That for the purpose of this act, all that portion of the parish of Orleans lying and being within the following limits, viz: Beginning at the Mississippi river at Julia street, following said street to the canal of the New Orleans Canal and Banking Company, following said canal as far as Lake Pontchartrain, along said lake to Bayou Saint John, following said bayou to the Canal Carondelet, along said canal to St. Peter street, along St. Peter street to the river, following the banks of the river to the starting point, shall constitute the first draining district. That the following portion of the parishes of Orleans and Jefferson, viz: Beginning at the Mississippi river at the upper side of Julia street, along Julia street to Mobile Landing, along said landing to Delord street, along Delord street and the upper side of the canal of the New Orleans Canal and Banking Company, following said Canal to Lake Pontchartrain, along the shores of said lake to the Jefferson & Pontchartrain Railroad, following said road to the river Mississippi, and following the banks of said river to the starting point, shall constitute the second leveeing and draining district. And all that portion of the parish of Orleans lying and being within the following limits, viz: From the river Mississippi at St. Peter street, along the lower side of said street to Canal Carondelet, following said canal to bayou St. John, along said bayou to Lake Pontchartrain, along the shores of said lake to Lafayette avenue, following said avenue to the river Mississippi, along the banks of said river to the starting point, shall constitute the third leveeing and draining district.

Section 2 creates the Board of Drainage Commissioners for the purpose of carrying into effect the act.

Sec. 3 provides for meetings of the Board.

Sec. 4th. *Be it further enacted, etc*, That the said Boards of Commissioners are hereby invested with all the rights and powers necessary to thoroughly drain the several draining districts, as expressed in the first section of this act, and to that end shall have the right, at all times of entering on the land within the limits of the districts aforesaid, and of placing thereon their engines and machinery, and of freely passing over and using the same, and of digging all necessary canals and drains, making all necessary embankments and levees and of doing all things lawful to be done, which may be useful or necessary in draining, clearing and reclaiming the lands within said districts. Said Board of Commissioners are authorized to cut their canals and drains through the streets and squares, and in the event of any street selected for the location of a canal being too narrow for a draining canal and a public highway, the said Board of Commissioners may cause such street to be widened: *Provided, however*, That any person or corporation shall have the right, by petition addressed to any court of competent jurisdiction, to oppose any acts of the Board, in the exercise of the duty of such court summarily to hear and determine the same after a full hearing of both parties, and such court shall limit the action of the Boards to the exercise of the powers herein conferred in carrying into effect the provisions of this act according to its true interest and meaning, and where the same cannot be done without injury or loss to the complainant, said court shall award adequate compensation; *and provided also*, That on an appeal to the Supreme Court the trial of the same shall have priorty and preference over all other cases therein, and on such appeals the said Boards shall only be required to give security for costs of appeal; and provided further, That in such suit nothing herein contained shall prevent said Board from recovering judgment against such complainant or complainants for damages, where it can be shown that such hvae been incurred, and that such suit or suits were brought on frivolous grounds or from improper motives.

Sec. 5 gives the Board power to sue or be sued.

Section 6th. Fixes the domicil of the board.

Sec. 7th. *Be it further enacted*, That said Board of Commissioners shall have the right to proceed, and are hereby empowered to levy, drain and reclaim the lands embraced within their respective drainage sections or districts, as established by this act in the following manner: Whenever either said Boards of Commissioners is prepared to drain their respective sections and districts, such Board of Commissioners shall cause a plan thereof to be made accurately designating the limits of the section or district to be drrained as far as possible, the subdivision of the property therein contained, and the names of the proprietors, as also on the dimensions and directions of the canals intended to be dug and the place where the steam engines will be established. Such plan or plans shall be deposited in the office of the Recorder of Mortgages of the parish in which the section or district to be situate, and notices shall be inserted in the French and English in two newspapers published in the said city of New Orleans, at least once a week during four weeks in succession, announcing that such Board of Commissioners will proceed to drain such section, describing the place where the plan thereof is deposited accurately defining the limits thereof, and indicating as nearly as possible the time within which the describing thereof, will be completed and the probable cost of said works. After such publications such Board of Commissioners shall apply by petition to one of the District Courts in the Parish of Orleans, for that portion of the section or district lying within the limits of said parish, and to the District Court in the Parish of Jefferson for that portion of the section or district lying within said parish, which court or courts upon due proof being made of the publications of said notices aforesaid, shall decree that each portion of the property situated within the said limits is subject to a first mortgage lien and privilege in favor of such Board of Commissioners for such amount as may be assessed upon such property for its proportion of the costs of draining such section or district and interest thereon, at six per cent.

per annum from demand thereof. The decree of the District Court in the Parish of Orleans, shall be recorded in the office of the Recorder of Mortgages in and for said parish, and the decree of the District Court in the Parish of Jefferson, shall be recorded in the office of the Parish Recorder of said parish, and a certified copy of the aforesaid plan or plans, shall be deposited in each of said offices for the information of said recorders. Said recorders shall be entitled to twenty dollars each for the recording of the said decree and the deposit of said plan or plans; and in case they be required by said Board of Commissioners to record the said decree in the name of any or all of the proprietors of real property within said section or district, they shall be entitled to receive fifty cents for such special recording; and whenever the said recorders or either of them may be required to deliver a certificate of mortgages on any real property embraced within said draining section or district, such recorder shall mention therein that such property is subject to a lien privilege and first mortgage in favor of the Board of Commissioners of the section or district in which such property is situate for such sum of money as may be assessed on such property for the draining thereof; said lien, privilege, and first mortgage, shall take precedence over all mortgages, liens, and privileges whatsoever, whether tacit conventional, legal or judicial; and shall attach to said property until the amount assessed and the interest thereon shall have been paid in full.

Sec. 8th. Be it further enacted, etc., That said boards of commissioners, each within its own section or district, shall have the right, and are hereby authorized and empowered to levy such uniform assessment or assessments upon the superficial or square foot of lands situate within the drainage section or district of such board, to defray the construction of the levees, machinery, canals, and other works necessary for the purpose of carrying out the provisions of this act, as applicable to its particular district, which shall be collected, from time to time, as the wants of such board or boards of commissioners may require; *Provided, however*, that the same

shall not, in the aggregate, for any one district, exceed the sum of three hundred and fifty thousand dollars; and provided further, that not more than one-half of said amount shall be demandable within two years after passage of this act.

Sec. 9th. Be it further enacted, etc., That on non-payment of the amount of the assessment, judgment therefor shall be recoverable before any court of competent jurisdiction, and the land so assessed shall be sold according to law, and each board are hereby authorized to purchase the same, and shall hold or dispose of the same for the benefit of such drainage district; Provided that the sale thereof shall be made at public auction, after thirty days' notice, by three advertisements in some newspaper published in each district; *And, provided further*, that the price of such sale shall fully cover the amount of the judgment, with all costs and interests up to the time of purchase by such draining board, with six per cent. per annum interest upon the aggregate so formed from that time until its alienation by the Board; and if, while the property of the drainage district, such property would have become liable to any further assessment, the sale shall also cover the amount thereof.

Secs. 10, 11 and 12 refers to compensaiton of commissioners, makes an appropriation from the swamp land fund, reserves the power of repealing, altering and changing act, and provides for act taking effect.

The act No. 57 of 1861, Session acts, p. 43.

To provide for the collection of the assessment for draining, under the act of March eighteenth, eighteen hundred and fifty-eight, and the act supplementary thereto of March seventeenth, eighteen hundred and fifty-nine.

Section 1. That the amount of assessment which the Board of Commissioners of the several draining districts are authorized to fix and apportion, to be paid yearly by the owner or owners of the lands within said districts, in order to pay the annual interest on the bonds issued or to be issued by said Boards of Commissioners, and such bonds as may mature by

virtue of the second section of an act supplementary to an act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, approved March eighteenth, eighteen hundred and fifty-eight, shall be collected and sued for, the following mode of proceedings, to wit: As soon as any assessments have been made and notice thereof shall have been given, a copy thereof shall be filed in the Third District Court of New Orleans, for the assessment made on property within the limits of the parish of Orleans, and in the Third Judicial Court, setting at Carrollton, for assessments made on property within the limits of the parish of Jefferson, on which tableau of assessment thus to be filed the property to be assessed shall be set forth, together with the amounts assessed, and the names of the owners thereof, if known, and if the owners' names are not known, then it shall be stated in said assessment roll that the property assessed belongs to owners unknown; that a petition shall be filed with said assessment roll praying for an order that all persons whom it may concern, do show cause within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved and homologated; that said order thus rendered shall be published in the English and French languages at least twice each week for thirty days in one newspaper published in the city of New Orleans, as to the order of the Third District Court of New Orleans, and in one newspaper published in the parish of Jefferson as to the order of the Third Judicial Court, setting at Carrollton; and after said publications the court shall, on motion of the Counsel of said Board of Commissioners approve and homologate said assessment rolls, which shall be a judgment against the property assessed and the owners thereof, on which execution may issue as on judgments rendered in the ordinary mode of proceedings, and the court shall at the same time and in the same judgment, order the delinquent parties to pay ten per cent., in addition to the amounts assessed to pay costs and counsel fees.

Section 2nd. Be it further enacted, etc., that this act shall take effect from and after its passage.

Act No. 30 of 1871, session acts, p. 75.

AN ACT.

To provide for the drainage of New Orleans.

WHEREAS, The proper and efficient drainage of the city of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also of the State of Louisiana; and whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion, therefore—

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the Mississippi and Mexican Gulf Ship Canal Company, a corporation now exising and domiciled in the city of New Orleans, be and is hereby authorized and empowered to excavate drainage canals and build protection levees within the present corporate limits of New Orleans and Carrollton, under the conditions and with the stipulations hereinafter expressed.

SEC. 2. *Be it further enacted, etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig a canal, and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city of New Orleans, and near the shore of Lake Ponchartrain; the exact location of the said canal and levee, and of all canals dug and levees built by the said company, to be designated and fixed by the Board of City Administrators, and the titles to the lands necessary for said works to be procured and held, for the benefit of the city New Orleans, by the Board of Administrators of the city of New Orleans; the said lake shore canal to be not less than sixty-five feet wide on the surface, and fifteen feet deep in the middle, with proper slope of the sides, the said canal or canals along the

lake shore to serve as a reservoir for draining the city of New Orleans and the lands in the rear of the city, the drainage to be pumped from the canal over into the lake, and the said protection levee to be not less than one hundred feet wide, and of sufficient height to completely protect the City from overflow from Lake Pontchartrain.

SEC. 3. *Be it further enacted, etc.*, That said company shall also be authorized and empowered to excavate canals of the dimensions, and at such localities as may be fixed by the Board of Administrators of the City of New Orleans, which shall fully drain the area bounded by the protection levees herein contemplated and the Mississippi river, and connect with the drainage canals located in the said area.

SEC. 4. *Be it further enacted, etc.*, That the said company shall also be empowered and authorized to build a canal and protection levee below the City of New Orleans to connect the lower end of the protection levee, along the lake, with the Mississippi, of a sufficient size to fully protect the city from overflow, and on a line to be designated by the Board of Administrators; and to construct a like canal and protection levee above the City, the dimensions and locality in like manner to be designated by the said Board of Administrators; the object of these two canals and protection levees to be the protection from overflow of the areas between the Mississippi river and Lake Pontchartrain, above the New or company canal, and below the Carondelet canal.

SEC. 5. *Be it further enacted, etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig all the smaller canals, required for the drainage of New Orleans and the lands in the rear of the said City, of the dimensions of ten feet or more than ten feet in width.

SEC. 6. *Be it further enacted, etc.*, That the Board of Administrators shall be required, and that it is hereby made their duty, immediately after the passage of this act, to locate the lines of the canals and protection levees, specified in the various sections of this act, in time to prevent delay in the

prosecution of the work on the part of the said company. The Board of Administrators are also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain, and moreover to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands; and should the City Council fail to locate the lines of said canals and protection levees above specified, the City of New Orleans is hereby made liable to the said company for the damages resulting from such delay.

SEC. 7. *Be it further enacted, etc.*, That said Mississippi and Mexican Gulf Ship Canal Company shall be required to have ready for work, within fifteen days after the passage of this act, machinery of sufficient power to excavate at least twenty-five thousand (25,000) cubic yards per month, and to move the same the distance required to build the protection levee, and to increase as soon as practicable their machinery to the capacity of at least fifty thousand cubic yards per month.

SEC. 8. *Be it further enacted, etc.*, That at the end of every month it shall be the duty of the City Surveyor of New Orleans, or an engineer appointed, by the Board of Administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company, during said month, and upon the measurement of the width and depth of the canal, canals or parts of canals dug, and protection levees built, certify as to the number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. It shall be the duty of the Administrator of Accounts, on the presentation to him of the said certificate of the City Surveyor or engineer appointed by the Board of Administrators, by the president of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excava-

tion, and fifty (50) cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the president of the said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to indorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants.

SEC. 9. *Be it further enacted, etc.*, That in order to provide funds for the payment of the work to be done by the said company, the three boards of draining commissioners for the draining districts of Orleans and Jefferson, established under the acts of March 18th, 1858, and of March 17th, 1859, and the several amendments thereto, and any and all other person, persons, or corporations, who may have them in possession, shall transfer to the Board of Administrators of New Orleans all moneys, assessments and claims of drainage in their hands or under their control, all titles to real estate, all books, plans, tableaux, judgments in favor of commissioners, the office furniture of said drainage commissioners, a true statement of the claims of said drainage commissioners against the city, to be adjudicated and settled out of the money collected by the city, and everything pertaining to said draining district; that the Board of Administrators of New Orleans, be and are hereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts, or of any other corporation charged with the duty of drainage and leveeing within the limits of the city of New Orleans and Carrollton; that the Board of Administrators be and are hereby authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the

books of the first, second and third drainage districts, under the acts of March 18, 1858, that of March 17, 1859, and the several suplementary and amendatory acts thereto, which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; *provided*, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also, to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under, and created by, the acts of March 18, 1858, and of March 17, 1859, and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said boards of draining commissioners; *provided*, that all money or moneys received by the said Board of Administrators from the said commissioners of the drainage districts, either from the sale of property received from the said commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage; *and provided further*, that the rights, powers and faculties possessed and enjoyed by said Board of Administrators of New Orleans, relative to drainage, shall be so construed as not to conflict with the rights, powers and faculties acquired by the said company, in excavating canals and building levees, as stipulated in the various sections of this act.

SEC. 10. *Be it fuuther enacted, etc.*, That all acts and parts of acts in conflict with, or inconsistent with the various provisions of this act, are hereby repealed, and especially the act entitled "An Act to repeal all laws and parts of laws creating drainage districts in certain portions of the parishes of Orleans, Jefferson," etc., passed March 2, 1869, generally known as the Ship Island canal bill; also, an act amendatory thereto, approved March 16, 1870.

SEC. 11. *Be it further enacted, etc.*, That it is hereby made the duty of the Board of Administrators to see that the parties whose duty it is to do the same, shall, immediately after the passage of this act, build such levees on both sides of the Carondelet canal, and the New, or Canal and Banking Company's canal, extending to Lake Pontchartrain and around their basins, as to effectually prevent the overflow of water from the said canals during storm, tides or high water in Lake Pontchartrain, the dimensions of said levees to be determined by the Board of Administrators.

SEC. 12. *Be it further enacted. etc.*, That this act shall be favorably construed, so as to favor all the purposes and objects of the same, and the operations of the provisions thereof, and shall take effect from and after its passage.

The act, No. 16, of 1876; Session act, p. 35:

To authorise the city of New Orleans to assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company, and its transferree; and to provide for the manner of making said purchase, and for paying therefor in drainage warrants.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the Common Council of the city of New Orleans is hereby authorized and empowered to transact and contract with the Mississippi and Mexican Gulf Ship Company, and the transferree thereof, for the purchase and settlement of all and any rights, franchises, and privileges created, authorized, or arising in favor of said company or said transferree, under and by virtue of act No. 30, of acts of 1871; also for the purchase and transfer to the city of New Orleans of all tools, implements,

machines, boats and apparatus belonging to said company or its transferree, and by it or him used for or pertaining to drainage work authorized to be done by said act No. 30.

SEC. 2. *Be it further enacted, etc.*, That should it be deemed advisable by said Council to make said purchase and settlement, it shall be the duty of said Council of the city of New Orleans to provide by ordinance for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance.

SEC. 3. *Be it further enacted, etc.*, That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the City of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferree of the said company under act No. 30, of acts of 1871, for work done. They shall be made payable out of the drainage assessments, and shall be issued as soon as any agreement shall have been completed.

SEC. 4. *Be it further enacted, etc.*, That whenever the sale and purchase contemplated by this act shall be completed, and the drainage warrants issued in payment of the price agreed on and fixed, the City of New Orleans, through its officers, shall have exclusive control of all the rights, powers, and franchises granted by act No. 30 of acts of 1871, relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company or its transferree; the City of New Orleans shall alone have the power, either through its own officers and employees, or by contract to the lowest bidder, to do all canaling, dredging, ditching or drainage work required to be paid for by assessment upon property or from the city treasury.

SEC. 5. *Be it further enacted, etc.*, That hereafter the City Council shall fix the dimensions of all canal excavations and protection levees required for the City of New Orleans.

SEC. 6. *Be it further enacted, etc.*, That all laws and parts of laws in conflict with the provisions of this act, or inconsistent

therewith be and are hereby repealed, and that this act take effect from and after its passage.

Act No. 48 of 18 77, Session p. 61.

AN ACT

To exclude certain lands from the drainage limits as heretofore established; to cancel liens and judgments for drainage of said lands, and to repeal certain laws relating to drainage of the parishes of Orleans and Jefferson.

Whereas, the several laws heretofore enacted for the drainage of certain portions of the parishes of Orleans and Jefferson, have failed in their purposes, and a certain portion of the lands therein situated have not and will not be drained; therefore:

Section 1st. Be it enacted by the Senate and House of Representatives of the State of Louisiana in general assembly convened, that all laws or parts of laws providing for the drainage of lands in the parishes of Orleans and Jefferson be and are hereby repealed, so far as they provide for the drainage of the lands north of the following line, commencing at the intersection of the Metairie Ridge, with the upper protection levees, along said ridge to the New Orleans Canal, to the Metairie road, thence along the Metairie road to Bayou St. John, thence along the Bayou St. John to Marigny avenue, thence along Bayou Sauvage to People's avenue, thence along People's avenue to the river Mississippi.

Section 2nd. Be it further enacted, etc., that all judgments for drainage of said lands, judgments creating liens and for assessment for drainage of said lands, and all legal proceedings pending therefor, be and are hereby cancelled and annulled; *provided*, that the benefits of this act shall not be invoked in favor of any land until the State and city taxes due thereon are paid, *provided further*, that all lands situated within the above described lines and excluded by this act from the drainage limits established under previous laws, and upon which drainage taxes or assessments have already been paid shall hereafter be exempt from all future drainage assessments.

Section 3rd. Be it further enacted, etc., that all acts or

parts of acts in conflict with or inconsistent with the provisions of this act be and the same are hearby repealed.

Act No. 67, of 1877 ; Session acts, p. 107,

To define the object of drainage assessments, and to regulate the collection of same, and to prevent judgments for assessments being rendered as personal judgments, and repeal so much of act No. 57, approved March 1st, 1867, as makes such judgments personal, and to confine the execution under assessment judgments to the property on which the assessment is levied.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the true intent and meaning of all drainage laws in the State wherein liens and privileges are recorded against property requiring drainage or judgment for the same shall be collected from the property such improvements by canals and adequate machinery as will effect the drainage equal in value to the assessment exacted from said property.

SEC. 2. *Be it further enacted, etc.*, That any assessment or judgment embraciag the same shall operate only upon the property upon which said assessment is levied.

SEC. 3. *Be it further enacted, etc.*, That all parts of act No. 57, Session acts of 1861, which make judgment or drainage assessmenss personal judgments be and the same are hereby repealed.

SEC. 4. *Be it further enacted, etc.*, That this act shall take effect from and after its passage.

Act No 147, of 1877, Session acts, p. 28.

To exempt landed property in the parish of Orleans, from drainage taxes and assessments.

WHEREAS, under a decree rendered by the late parish court in October, eighteen hundred and forty-five, in pursuance to an act approved the twentieth of March, eighteen hundred and thirty-nine, to amend an act entitled, "An Act to provide for the drainage and clearing of the marshy grounds and cypress swamps situated between the city of New Orleans, its incorporated suburbs and Lake Pontchartrain, approved the nineteenth of March, eighteen hundred and thirty-five, that portion of land comprised within the New Orleans canal, the Metarie road, the Bayou St. John and Claiborne street, has

been assessed with a drainage tax, which has already been paid by the owners of said portion of land.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That by reason of a drainage tax having already been paid by the owners of said portion of land, the same is hereby exempted from any other drainage tax or assessment, and all judgments for the same are hereby cancelled and annulled.

SEC. 2. That all laws or parts of laws in conflict with the act be and the same is hereby repealed, and that this act shall take effect from and after its passage.

OFFICE SUPREME COURT U. S.
FILED
JAN 29 1883
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT

No.———

JOHN CROSSLEY & SONS, PLAINTIFF IN ERROR.

versus

HENRIETTA DAVIDSON, ET ALS., DEFENDANT IN ERROR.

ASSIGNMENT OF ERRORS, BY PLAINTIFF IN ERROR.

The plaintiffs in error, assign for error in the decision of the Supreme Court of Louisiana, brought here for review by the writ of error herein.

That the State Court erred in not maintaining that the Act No. 30, of 1871, of the Legislature of Louisiana, was a contract, between the City of New Orleans, and the plaintiff in error as holders of the drainage warrants issued under that act, within the protection of the Article 1st Section 10, of the Constitution of the United States.

That the State Court erred, in not maintaining that the Act No. 16 of 1876, of the Legislature of Louisiana, was a contract between the City of New Orleans and the plaintiff in error, as holders of drainage warrants issued under that act, within the protection of the Article 1st, Section 10th of the Constitution of the United States.

That such being the contract, under which the plaintiff in error claimed that all assessments for drainage of the lands, specified in said acts of the Legislature, and all judgments for such assessments, were pledged to him for the payment of the drainage warrants, by him held; and the defendant in error, pleading in the Court below, to obtain the relief by him sought, from one of the drainage assessments, and the judgment

thereon, certain legislative acts of 1877, which undertook to release and cancel such assessments, and the judgments thereon; to repeal the laws on the subject of drainage, so as to prevent further assessments: and which undertook to take away the liability for drainage assessments, created by the contract, of plaintiffs in error: the plaintiffs contesting the said legislative acts of 1877, because violative of the 1st Art., 10th Section of the Constitution of the United States, the State Court erred, in not deciding the said contract of plaintiffs in error, could not be impaired in the manner proposed by said legislative acts of 1877.

That the State Court erred, in so far as it maintained, that the supposed abandonment by the City, of the drainage directed by the legislative acts constituting the said contract, of plaintiff in error, relieved the defendants in error and their property from liability, under the drainage assessment, and judgment therefor, pledged by said contract for the payment of the warrants held by plaintiffs in error; the State Court in so deciding, in effect maintaining the said legislative acts of 1877, which, in their whole scope, sought to bring about, to the extent and in the manner stated in them, the abandonment supposed in the decision of the State Court, to relieve the defendants in error, from said liability: the said acts of 1877, being impugned by plaintiffs in error, in the State Court, as violative of his contract, and of the aforesaid contract clause of the Federal Constitution.

That the State Court in not deciding that the said acts of the State Legislature of 1877, as well as the act No. 147, of 1877, of like tenor and scope, were void and null, because violative of said contract of plaintiff in error, and of such Article 1, Section 10 of the Constitution of the United States.

That the State Court erred in not maintaining the exception of *res judicata* to the demand of the defendants in error, pleaded by plaintiffs in error in the State Court, based upon the judgment of this Court in Davidson et als., plaintiffs in

error vs. the City of New Orleans, reported in 96th United States, p. 97, affirming the judgment of the Supreme Court of the State against the defendants in error, i. e., the estate of John Davidson: the plaintiffs in error, claiming the protection in the State Court against the demand of defendants in error, of an authority exercised under the United States, to-wit: the said judgment of this Court.

That the State Court erred in not holding that the right of the plaintiffs in error to the judgment against the estate of John Davidson, as a part of the assets pledged by the aforesaid acts of 1871 and 1876, for the payment of the warrants held by the plaintiffs in error, was protected by the 14th Article, Section 1, of the Constitution of the United States, which prohibits the State from depriving any person of his property without due process of law.

HENRY C. MILLER,
Of Counsel for Plaintiffs in Error.

OFFICE SUPREME COURT U. S.
FILED
DEC 30 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 1017.

JOHN CROSSLY & SONS, LIMITED, INTERVENORS,
PLAINTIFFS IN ERROR.

vs.

THE CITY OF NEW ORLEANS AND HENRIETTA DAVIDSON, TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JOHN DAVIDSON *et als.*, DEFENDANTS IN ERROR.

Error to Supreme Court of Louisiana.

B. R. FORMAN,
Attorney for Defendants in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 1017.

JOHN CROSSLY & SONS, LIMITED, INTERVENORS,
PLAINTIFFS IN ERROR.

vs.

THE CITY OF NEW ORLEANS AND HENRIETTA DAVIDSON, TESTAMENTARY EXECUTRIX OF THE SUCCESSION OF JOHN DAVIDSON *et als.*, DEFENDANTS IN ERROR.

Error to Supreme Court of Louisiana.

MOTION TO DISMISS OR AFFIRM.

And now, December 30, 1882, B. R. Forman, attorney for the defendants in error, Mrs. Henrietta Davidson, individually and as testamentary executrix of the succession of John Davidson, deceased, and tutrix of her children and John Davidson, Jr., and Elizabeth Bailey, and Charles H. Bailey, her husband, and Mary L. Reynolds and David Este Reynolds, her husband, and James Alexander Davidson, moves the court to dismiss the writ of error herein on the ground that no question under Revised Statutes, §709 was

properly raised in or was decided by the Supreme Court of Louisiana in this case or *in the alternative.*

Defendants in error through their said attorney further move the Court to affirm the judgment on the ground that if the record show that this Court has jurisdiction it is manifest that the question on which jurisdiction depends is so frivolous as not to need further argument.

And that this motion be made returnable on Monday, 29th January, 1883.

B. R. FORMAN,
Attorney for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1882.—No. 1017.

JOHN CROSSLEY & SONS, LIMITED,

vs.

CITY OF NEW ORLEANS AND HENRIETTA DAVIDSON *et als.*

Brief and Argument of Defendants in Error on Motion to dismiss or Affirm.

"Inasmuch as the clerk of this court cannot print the entire transcript brought up by plaintiffs in error, for want of an appropriation, we have printed the pleadings and the statement of facts of the State district court, and the judgment of the State supreme court and referred to pages of the manuscript transcript in order to easily put your honors in posession of the case made by the *Record*. We have virtually printed the *Record*, and annex it to this motion to dismiss or *affirm* for *convenience* of reference. Plaintiffs in error, have taken no bills of exception, nor made any assignment of errors."

Defendants in error, the widow and heirs of John Davidson, deceased, were plaintiffs in the State court, and the city of New Orleans was defendant. John Crossley & Sons the present plaintiffs in error were intervenors.

By Act 165, 1858, the Legislature of Louisiana had established three separate and distinct drainage districts within the territory of portions of the parishes of Orleans and Jefferson, and established three separate and distinct Boards of Commissioners, giving to each board authority to devise and plan a system of drainage for the district not to exceed in cost $350,000, and to impose a specific assessment per

superficial foot on the lands drained sufficient to pay the cost of the work.

The Board of Commissioners of the first drainage district, (which is alone concerned in this case) imposed a specific assessment of $3\frac{3}{10}$ mills per superficial foot for the purpose of effecting the drainage of that district, topographically, as matter of fact and as matter of law, a distinct entity.

In 1875, the supreme court of Louisiana, "In the matter of the commissioners of the first drainage district," (27 Louisiana Annual, 20,) rendered a decree against the property and the owners thereof for this assessment of $3\frac{3}{10}$ mills per superficial foot.

A writ of error was taken from this honorable Court to supreme court of Louisiana in that case, the decision is reported in 96 U. S., 97., Davidson *vs.* New Orleans. The Federal question then urged was that the citizen's property was taken without due process of law; but since the property owner had an opportunity to defend himself, and had his day in court, the Court held, and we think correctly, that there was due process of law within the meaning of the Federal Constitution. In concluding the Court said: "As there is no error in the judgment of the supreme court of Louisiana, of which this court has cognizance, it is affirmed."

The judgment of the supreme court of Louisiana, in this case, obtained no "Federal authority" within the meaning of § 709, R. S., by this decision of the United States Supreme Court.

People *vs.* Central R. R., 12 Wallace, 445.

The present suit was brought to perpetually enjoin and

restrain the city of New Orleans from executing the judgment of the State supreme court mentioned, (27 A., 20,) because, under the well-settled jurisprudence of Louisiana, (11 La. Annual, 373, decided in 1856, approved in 1875,) a specific assessment for local improvement can only be sustained where the benefit to the property, at least, equals the amount of the assessment, (18 N. J., Equity, p. 526; Cyprus Pond Company *vs.* Hooper, 2 Metcalf, Ky., 350; Municipality No. 2, *vs.* White, 9 La. Annual, 446;) and the sole consideration and predicate of that judgment was the proposed benefit to be done by drainage to petitioner's property. That since the judgment was rendered, the entire scheme had been abandoned, the machinery and dredging boats sold, not a lick of work done since June, 1876, and plaintiff's lands are still two feet under water, the resort of fish and water-fowl, and instead of being drained the natural drainage through an ancient bayou has been obstructed.

That no debt, bonds, or warrants, exist or are outstanding for any work done on the first draining district; it has all been paid for, and the amount of this specific assessment is ten times the value of the land, and it would be against equity and good conscience to execute the said judgment.

All of these facts were found proven by the State district judge of original jurisdiction, and by the supreme court of Losisiana, and the case was decided exclusively on these *facts* found by the court, and the State court found it unnecessary to decide any of the Federal questions attempted to be raised by the intervenors, John Crossly & Sons. The present plaintiffs in error intervened and alleged they held drainage warrants, but did not pretend that they were issued

for drainage work in the first drainage district. On the contrary, it was affirmatively proven, and found as a fact by the State courts, that none of the drainage warrants they held were for work done in the first drainage district, and the State district court, and the supreme court, did not decide the Federal question (which they attempted to lug in by the ears) adversely to plaintiffs in error.

They claim no title under any Federal law or constitution.

The case was not decided, and did not turn upon "any act of the State, either by constitution or statute," which impaired the obligation of any contract in which they were interested, or which in any manner was repugnant to the Federal Constitution.

The case was decided on the *facts* found proven by the State court and the general principles of jurisprudence, and no Federal question was decided nor necessarily involved in the decision.

In Crowell *vs.* Randell, 10 Peters, 391, Mr. Justice Story elaborately reviews the previous decisions, and settles the jurisdiction of this court to revise the decisions of the State courts under the 25th section of the judiciary act.

In Armstrong *vs.* Treasurer of Athens, 16 Peters, 285, the court said:

"It must appear from the record that the (Federal) question was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed without deciding it."

See, also, Hoyt *vs.* Sheldon, 1 Black, 518; Havemeyer *vs.* Jona, 13 Wallace.

In Knox *vs.* Exchange Bank (12 Wal., 379) the court said:

"This court cannot entertain jurisdiction of a case from a State court, because the judgment of that court impairs or fails to give effect to a contract. The judgment must give effect to some State statute or State constitution, which impairs the obligation of a contract."

Murdock *vs.* Memphis, 20 Wall., 590.

"Jurisdiction does not exist where, though the record presents a Federal question, such question was not in fact passed on, and its decision was not necessary in determining the rights of the parties."

McManus *vs.* O'Sullivan, 91 U. S., 578.
Bolling *vs.* Lessner, 91 U. S., 595.
Brown *vs.* Atwell, 92 U. S., 329.
Hager *vs.* California, October term 1877, cannot find it reported.
New York Life Ins. Co. *vs.* Herndon, 92 U. S., 286.

It has always been held that *findings* of *facts* by the State courts are conclusive on this court, and are not reviewable by it.

The authorities cited appear conclusive against the jurisdiction.

Respectfully submitted,

B. R. FORMAN,
Attorney for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

No. 1017.—October Term, 1882.

JOHN CROSSLEY & SONS, LIMITED, Intervenors,
Plaintiffs in Error,

vs.

THE CITY OF NEW ORLEANS AND HENRIETTA DAVIDSON *et als.*,
Defendants in Error.

RECORD.

To the Honorable the Third District Court for the Parish of Orleans:

The petition of Mrs. Henrietta Davidson, testamentary executrix of the Succession of John Davidson, and natural tutrix of Mary S. and Alexander Davidson, and widow in community of the late John Davidson, and the petition of Elizabeth J. Davidson, wife of Charles H. Bailey, and of the said Bailey herein appearing to aid and authorize his wife, and of Charles M. Parks, and of John Davidson, emancipated and dispensed from attaining the age of majority, by judgment of the honorable second district court—all residing in this city except Charles Parks, who resides in North Carolina, respectfully shows, that under the provisions of act 165 of 1858, the boards of commissioners of the first, second, and third draining districts were created for the avowed purpose of levying, draining and reclaiming the swamp-lands in the parishes of Orleans and Jefferson. That said boards of commissioners were required, when they were prepared to drain their respective districts, to cause a plan thereof to be made, accurately designating the limits of the district and sub-divisions of the property therein contained, and names of the proprietors, as also the

dimensions and directions of the canals to be dug, and the place where the steam engines were to be placed. The plans were required to be deposited in the office of the recorder of mortgages and published, and were made the basis of all the future proceedings looking to the collection of the assessments hereinafter mentioned. The said publication was required to state the cost of the work proposed, and the time within which the draining was to be completed; said publication was made a summons or citation of the owners named, on which, as on a foundation, all future proceedings rested. That in 1859 said plans were deposited, and publication made, and the cost designated for the first draining district was $350,000, and the time designated for the first draining district, within which the work was to be done, was three years from that date. That the assessment of property was required to be upon the superficial foot, and in such amount, and no more, as would be necessary to do the work, not exceeding $350,000 in any one district. Now, your petitioners aver that the rate of assessment is not uniform by an *ad valorem* rate, nor by the superficial foot in the three districts; but that it is three and three-tenths of a mill in the first district, and two mills in the second and third. No work was done under these laws, save in the first and second districts. The city and commissioners have already collected more than $350,000 in the first district, and the said district is not drained, although twenty years have elapsed since the work was begun. No bonds were issued and no money borrowed under the amendatory act of 1859, except ten thousand dollars which have since been repaid in said first district. Petitioners show that in 1871 the city of New Orleans, having succeeded to the rights of the several boards of draining commissioners, filed tableaux of assessment in the seventh district court, entitled "In the matter of the commissioners of the first draining district, praying the homologation of the assessment roll," etc. That the judge of

said court rejected said petition, but on appeal the supreme court reversed said judgment, and decreed that "said roll be approved and homologated, and this approval and homologation shall operate as a judgment against the property described as assessed in said roll, and also against the owner or owners thereof, with ten per cent. in addition to the amount assessed, to pay costs and counsel fees."

And by operation of law the said record was transferred to the superior district court, and thence to this honorable court; and said judgment is now the judgment of this honorable court. Now, your petitioners show that the only basis or consideration of, or reason why, said unequal and not uniform assessment of three and three-tenths mills could be claimed against property, was that the property drained would be benefited by the proposed works, so as to be increased in value at least the cost of the work assessed, else that property to the extent of the difference between the increased value and the cost of the work assessed to it, would be taking it from the owner for a purpose of public utility, without adequate compensation previously made as provided by the constitution. Now, your petitioners show that under act 30, 1871, Sec. 9, all the assets and rights of the drainage commissioners, which boards have been abolished in 1868, were transferred to the mayor and administrators of the city of New Orleans; and a private corporation, the Mississippi and Mexican Gulf Ship-Canal Company, was charged with the work of making the levees and canals to effect the drainage. That under certain powers of attorney and acts of pledge or transfer from said company, one Warner Van Norden claimed the right to do said drainage work under said act. Now, your petitioners show that since the judgment of the supreme court, aforesaid, was rendered, all the work of draining the swamp in the rear of the city has been abandoned entirely; the dredge boats and machinery have been removed and advertised to be sold by the city of New Orleans; that the charter of the

said Mississippi and Mexican Gulf Canal Company has been judicially forfeited for insolvency, and the said company is hopelessly and largely insolvent and entirely unable to complete the drainage. That W. Van Norden is insolvent and unable to complete or go on with the drainage work, and they have both long since abandoned it. That the city of New Orleans is also insolvent. That her yearly expenses exceed her receipts by a large amount, and she is unable to carry on the current expenses of her municipal administration; still less is she able to go on and complete the drainage. That the Legislature, recognizing these facts, passed an act, No. 16, p. 35, 1876, to enable the city of New Orleans to assume exclusive control of all the drainage work, and to buy out all the rights of said company, and its alleged transferee, which was shortly thereafter done; and recognizing the further fact that the whole scheme had proved abortive, especially as to those lands lying north of the Metairie ridge, towards Lake Ponchartrain, and that said lands, after twenty years, had not been drained, and that the work had been abandoned, and most of the said lands could not be drained except at a cost exceeding ten times their value, and five-fold what would be their value after drainage, and that the only valuable portion of said lands is drained naturally, the Legislature passed act No. 48, 1877, by which all laws or parts of laws providing for the drainage of lands in the parishes of Orleans and Jefferson, be and they are hereby repealed, so far as they provide for the drainage of lands within the following lines: Commencing at the intersection of Metairie ridge with the upper protection levee along said ridge to the New Orleans canal, to the Metairie road, thence along the Metairie road to Bayou St. John, thence along the Bayou St. John to Marigny avenue, thence along Marigny avenue to Bayou Sauvage, thence along Bayou Sauvage to People's avenue, to Lafayette avenue, thence along Lafayette avenue to the river. Your petitioners show that there is within the

lines mentioned in said act, north of the Metairie road, a tract of land, mostly swamp, containing about four hundred acres, or over 16,000,000 superficial feet, known as the Allard Place, lately belonging to John Davidson, deceased, whose succession your petitioners have inherited and represent, which tract has never been drained at all, either by the drainage commissioners or by the city of New Orleans; and so far from draining it, the city of New Orleans has made a ditch and thrown up large banks of earth by which the natural drainage of said lands through Bayou Metairie (which is a natural stream) is destroyed, and notwithstanding said facts and said statutes the city of New Orleans claims from petitioners, and as a privilege on the lands, the property of petitioners, to the amount of over fifty thousand dollars, and the city has recorded a large claim for drainage assessments which she claims to be a privilege and mortgage on the property of petitioners. That the amount of the judgment aforesaid claimed against the property of petitioners exceeds the sum of five hundred dollars, to-wit: by the certificate annexed, the sum of $2,691. The value of the lands assessed, to-wit: the tract known as the Allard Place does not exceed five thousand dollars without the buildings thereon; and even if it were drained, its value would not exceed ten thousand dollars without the buildings and improvements thereon; and whereas after the lapse of twenty years, since the drainage was projected, it has not been drained, and its drainage has been abandoned, it is illegal and against good conscience and equity to enforce any judgment or claim against your petitioners for drainage. It would not only take from petitioners said property without any compensation, but other property without any purpose of public good being subserved; and an enforcement of said judgment would also be contrary to the true intent and meaning thereof and against the letter of the act of the Legislature, No. 67, 1877, as well as of Secs. 7, 8, and 9 of the act of 1858. Petitioners show that since the only con-

sideration of said claim and said judgment was the proposed public benefit to be obtained by the drainage of the lands in the rear of the city, and that the grounds upon which an onerous and unequal assessment was made upon said lands was, because of the enhancement in value that they would undergo by reason of the drainage; it being assumed by the Legislature and the court that the land, when drained, would be worth much more than the cost of the drainage. Since these considerations have utterly failed, the lands not being drained, and the work abandoned with legislative sanction, it would be against equity and good conscience to enforce said judgment as a privilege against the lands, and above all as a personal judgment against petitioners. Petitioners further show that in the second district where the lands had been drained, they have paid their assessment in full, amounting to several thousand dollars, but that all the lands of petitioners in the first drainage district, between the Mississippi river and the Metairie ridge, were already drained, and the expense thereof paid under the old drainage act of 1835; that no benefit has accrued to said lands south and southeast of Metairie ridge, or can accrue from drainage of the swamp lands north of the ridge, nor their value be enhanced in such a way that three and three-tenths mills per superficial foot would be any correct measure or proportion of such increased value. Petitioners aver that more than enough money and values have been voluntarily paid to the drainage commissioners and the city of New Orleans to pay for all the work honestly and fairly done; that the whole consideration of the enforced contract made by the State for and between the drainage commissioners or the city of New Orleans and the owners of property as to the drainage thereof has utterly failed; that for all the work done in the first drainage district settlement has been made in cash or gold bonds or premium bonds, to pay which the property of petitioners throughout the city is annually taxed, and it is unequal and unjust to make pe-

titioners pay twice for the same pretended and unjust claim; that since the first of January, 1875, only $3,000 of drainage warrants for work done in the first drainage district have been issued, and the city has received over $75,000 in cash, collected from property in the first drainage district, towards paying said warrants, and furthermore holds property taken for drainage assessments in said district bought at the price of $167,605.10, said amount being taken from the following parties in entire satisfaction of their drainage tax, being one-half their swamp property in said district, while the other half was released from all claims, to-wit:

The heirs of Lavergne	$2,667 49
Heirs of Genois	7,741 97
The Society for the relief of Destitute Orphan Boys	33,489 90
Female Orphan Asylum	38,741 30
The Milne Asylum for Destitute Orphan Boys	38,390 63
The Milne Asylum for Destitute Orphan Girls	34,501 37
Charles D. Moran	12,042 74

That it is unequal to take from the owners of so large an amount of swamp property only one-half thereof to pay for draining the whole, and at the same time to take from petitioners all their swamp property, and a great deal more besides, to pay for draining the swamp property taken away. The value of the property of petitioners in said draining district exceeds the sum of fifty thousand dollars. Petitioners show that the heirs of Mr. John Davidson were not parties to said proceeding in the late seventh district court, and that Mr. John Davidson was dead at the time. Wherefore, petitioners pray that an injunction issue enjoining and restraining the city of New Orleans, its agents and attorneys, from attempting to execute or carry into effect said judgment in the matter of the commissioners of the first drain-

ing district, late of the seventh district court, and now of the records of this honorable court, or from seeking to enforce any privilege or mortgage against any lands of petitioners on account of any drainage claims in the first draining district, and that the city of New Orleans be cited to appear and answer this petition, and, after due proceedings, there be judgment perpetuating the injunction and annulling the said judgment, and decreeing that the city of New Orleans has no legal claim, privilege, or mortgage on any lands of petitioners for drainage or otherwise, and that all inscriptions for drainage privilege or mortgage be cancelled and erased, and the recorder of mortgages be ordered to erase the same at the cost of the city; and if for any cause this relief be denied, that said drainage claims and privileges claimed by the city be restricted to the specific property as to which it was assessed, and decreed not to be a personal debt against any of your petitioners; and for costs and general relief.

(Signed) B. R. FORMAN,
Attorney for Petitioners.

A supplemental petition pleads that act No. 30, 1871, is unconstitutional, because it contains objects not expressed in its title, to wit:

1st. To grant exclusive franchises to the Mississippi and Mexican Gulf Ship-Canal Company.

2d. To fix an arbitrary price for excavations and levees.

3d. To authorize and require the issue of draining warrants.

4th. To transfer to the city of New Orleans all the rights and claims and assessments of the drainage commissioners.

5th. To require the city administrators to collect the drainage tax under the act of 1858.

6th. To repeal the Ship Island Canal bill of 1869.

7th. To authorize summary proceedings in court or any other mode of proceeding than by petition and citation.

Plaintiffs seek to enjoin the execution of a judgment of the late seventh district court for the parish of Orleans for causes occurring after the judgment, and by reason of acts of the Legislature passed since said judgment, and also to obtain a decree that said judgment cannot affect the present plaintiffs who (except the executrix of Mr. John Davidson) were not parties to it, and thereby to cancel a recorded claim for a privilege for drainage taxes, and have it decreed as not binding on petitioners' property; and in any event, to have it restricted to the property in respect to which it was assessed.

See amended petition and plea of prescription.

The facts alleged in this petition were abundantly proven. No evidence offered on either side was excluded by the learned and painstaking judge of the court of original jurisdiction. We will copy his very carefully prepared statement of facts which he found proven, and which is declared proven and adopted by the supreme court of Louisiana.

Exception to Jurisdiction of the State District Court (Transcript, pp. 19 *and* 20) *not necessary to copy.*

Exception of no cause of action and plea of *res adjudicata* filed by the city of New Orleans, and amended, exception of no cause of action (pp. 20 and 22) filed by the city of New Orleans, 13th February, 1879, pp. 22 and 23 not necessary to copy because they were over-ruled by the supreme court of Louisiana on November 30, 1880, (Record, p. 29,) and no writ of error was asked for, and the city of New Orleans has not asked for a writ of error.

Answer of the City of New Orleans (Transcript, p. 41.)

And now before the court comes the city of New Orleans and, reserving her rights under the exceptions heretofore filed, for answer to the petition filed and served herein, she denies each and every allegation therein contained except such as may be hereinafter admitted, and which it may be to her interest to admit, and for further and special answer this appearer says, that in the year 1858 the State of Louisiana, with a view to effect a drainage of the city of New Orleans and a limited portion of the parish of Jefferson, by an act of the General Assembly passed for that purpose, organized three separate and independent drainage sections and established three separate and independent boards of drainage commissioners, giving to each board within its respective district full power and authority to construct certain drainage works therein, and to provide for the payment of such works by means of an assessment to be levied upon lands lying within the district. That on or about the 12th September, 1861, the board of commmissioners of the first drainage section levied an equal and uniform assessment of $3\frac{3}{10}$ mills per superficial or square foot upon all lands lying within the limits of the first drainage section. That on or about the 19th December, 1866, John Davidson became one of the commissioners of the first drainage district, and as such a member of the board of commissioners for that drainage section; that he continued to fill that office for a number of years, attending regularly the meetings of the board, and thereby and otherwise making himself familiar with all that had been done by the commissioners of the first drainage district prior to the connection of said Davidson with the said board, more particularly with the levy of a drainage assessment of $3\frac{3}{10}$ mills per superficial or square foot upon all lands lying in the first drainage district, including certain lands therein situated, and being and belonging to him, said Davidson; that he continued to hold

the position of drainage commissioner aforesaid for five or six years, and throughout that extended length of time recognized and ratified all that had been done in connection with the first drainage district, constantly and continuously acquiesced in the assessment of $3\frac{3}{10}$ mills levied as aforesaid, and compelled the owners of property situated in the drainage section, or district aforesaid, to pay that rate of assessment. Further, this respondent shows that prior to and from the date of the levy aforesaid down to the month of June, 1876, a very large expenditure of time, labor, and money was bestowed upon the drainage work authorized and required by the drainage act aforesaid, and certain other acts supplementary to and amendatory thereof; that John Davidson during his lifetime, and his executors, heirs, and representatives since his death were fully aware of the executions of said work at the time it was being done and performed, and of the heavy outlay of time, labor, and money occasioned thereby, but that they refrained from taking steps, judicially or otherwise, to arrest the execution of said work, and permitted the same to be prosecuted without objection, and a silent recognition and acquiescence on their part.

That by reason of the premises aforesaid and for other good and sufficient reasons the said Davidson and his said executrix, heirs, and representatives, are estopped from urging unconsitutionality in act No. 165, of the year 1858, and act No. 30, of the year 1871, and any and all other laws or statutes of the State of Louisiana, under and by virtue of and in connection with which such work was done and performed, and under and by virtue of which the assessment upon banks in the first drainage district was levied and imposed, and from denying the validity of the tax of $3\frac{3}{10}$ mills, and the liability of said Davidson, his succession, his heirs, and representatives to pay the same. And this respondent further shows that under and by virtue of certain laws of the State of Louisiana for that purpose duly

made and passed an assessment roll or tableau, for the first drainage district, was filed in a court of competent jurisdiction for homologation; that upon such roll or tableau Davidson was placed as a drainage tax-payer in the sum $; that in or about the month of January, 1875, the roll or tableau aforesaid was homologated and affirmed by a final judgment of the supreme court of Louisiana, and such approval and homologation was declared by the court in its said judgment to operate as a judgment against the property described as assessed in the said roll or tableau, and also against the owner and owners thereof, with ten per cent. in addition to the amount assessed, to pay costs and counsel fees, as will more fully and at large appear from the record in suit No. 4338, upon the docket of the supreme court aforesaid, and to which for greater certainty reference is prayed. That the proceedings aforesaid were carried by writ of error or appeal before the Supreme Court of the United States, in which last-mentioned tribunal the judgment of the supreme court of Louisiana was affirmed and the cause remanded for execution, and this appearer now pleads against the demands of plaintiffs the judgment aforesaid as *res adjudicata*, not merely in reference to such questions, matters, and things as were actually inquired into and disposed of by the said judgment, but all other questions, issues, matters, and things, which might have been therein inquired into and disposed of.

Further answering, this respondent says that from the date of the promulgation of the act No. 165, of the year 1858, down to the passage of act No. 30, of the year 1871, there was constructed and turned out a very large amount of drainage work; that from the date of the passage of the act last aforesaid, or shortly thereafter, down to the close of the year 1875, there was constructed and turned out in strict conformity to the requirements of act No. 30, of the year 1871, drainage work to the amount of not less than $1,866,-459.18; that during the months of January, February,

March, April, May, and down to the 7th June, 1876, additional drainage work, as required by act 30, 1871, was constructed and turned out to the extent of $111,275.41, or at an average monthly rate of $22,255.08; and that at the date last mentioned, June 7, 1876, the city of New Orleans, under an act of the Legislature of Louisiana, known and designated as act 16, of the year 1876, acquired exclusive control over all drainage in the said corporation.

This respondent specially denies that there has at any time been an abandonment of the drainage work by the municipal authorities of New Orleans, or any other person or corporation authorized to do drainage work; denies that a lawful abandonment can be made under existing laws; denies that an actual suspension or abandonment by the city could have the legal effect to relieve the drainage tax-payers from the payment of their drainage assessment; denies that the State of Louisiana has in any way or manner required or authorized an abandonment of the drainage work; and, finally, denies that an abandonment on the part of the State can legally work a cancellation of the liability of property owners to pay their drainage tax.

And for further answer this appearer says that long before and at the time of the pretended abandonment on the part of the State, the Mississippi and Mexican Gulf Ship-Canal Company, Warner Van Norden, its transferee, and the holder of drainage warrants issued to the said company, and Van Norden had acquired through contract between the State and the company, viz., by act 30, of the year 1871, a vested right to the entire tax levied in the first drainage district, such right being in value not less than $368,695, and arising from certain drainage warrants issued for work and labor done and performed under the act last aforesaid, now outstanding and unpaid, besides an additional amount of drainage warrants to the extent of not less than $300,000 and upwards, constituting the price or consideration of the transfer made to the city of New Or-

leans, under act 16 of the year 1876; that the pretended abandonment relied on by plaintiffs, so far as it may be said to operate a cancellation or release of the drainage assessment, in whole or in part, impairs the obligation of the aforesaid contract, and divests valuable rights vested in the holder or holders of drainage warrants, and, therefore, that said pretended abandonment is in violation of article 1, section 10, of the Constitution of the United States, and article 5 of the amendment to that Constitution, and also article 110 of the constitution of the State of Louisiana of the year 1868, and cannot be regarded by the court.

And this appearer further says that acts 48 and 67, of the year 1877, and act 147, of 1878, all of the sessions of the General Assembly of the State of Louisiana, impair the obligation of the contract and destroy the vested rights aforesaid, and that they, too, are in violation of article 1, section 10, of the constitution of the United States, and also article 110 of the Constitution of the State of Louisiana, of the year 1868, and can therefore have no force and effect. And for further answer the respondent says that by act No. 16, 1876, the Common Council of the city of New Orleans was authorized and empowered to purchase from the Mississippi and Mexican Gulf Ship-Canal Company and its transferee, Warner Van Norden, any and all rights, franchises, and privileges created by or arising from act No. 30, of the year 1871, together with the tools, implements, engines, boats, and apparatus belonging to said company and its transferee aforesaid, appertaining to or used for the drainage work authorized to be done by said act No. 30; that on or about the 7th June, 1876, a formal transfer was made; and that said city of New Orleans, as the price or consideration of such transfer, issued to said company and Van Norden drainage warrants to the amount of $320,000, having the same force and effect as those theretofore issued to the transferee of the said company under act No. 30 of the acts of 1871 for work done, the aforesaid warrants for $320,000,

by the said act No. 16, of 1876, being made payable out of the drainage assessments. That the whole of the said warrants for $320,000 are now outstanding and unpaid, and that a collection of the drainage tax or assesement is essentially necessary for the purpose of paying and taking up the warrants last aforesaid and the warrants issued for work done and labor performed under act 30, of the year 1871. Wherefore this respondent prays that judgment may be rendered in favor of respondent and against plaintiffs; that the writ of injunction therein ordered and issued may be avoided and set aside, dissolved, and held for naught; that the said plaintiffs and their surety upon the injunction bond may be jointly and severally condemned to pay interest at the rate of 8 per centum per annum from the date of issuing said writ until paid; 10 per centum addition thereto upon the amount of the judgment enjoined for special damages; five thousand dollars for counsel fees, and the respondent may recover cost and other general relief in the premises.

(Signed) SAMUEL P. BLANC,
Attorney for Respondent.

(Signed) GEO. S. LACEY,
Of Counsel.

The present plaintiffs in error were intervenors in the State court and filed the following petition of intervention 3d December, 1880, after the State supreme court had overruled the exceptions of the city of New Orleans and remanded the cause for trial on its merits, (p. 52:)

Petition of Intervention of John Crossly & Sons, limited.

HENRIETTA DAVIDSON *et als.* *vs.* CITY OF NEW ORLEANS. } No. 1306. Civil District Court.

To the Honorable Judges of the Civil District Court, Parish of Orleans:

The petition of intervention of John Crossly & Sons, limited, a manufacturing and commercial concern duly established and organized under the laws of the United Kingdom of Great Britain and Ireland, and trading and doing business at Halifax, England, respectfully represents that they are the owners and holders of certain drainage warrants issued under and by virtue of act No. 30 of the session of the General Assembly of the State of Louisiana, for the year 1871, amounting to a sum not less than $300,000, and all of which said warrants were acquired by your petitioners in good faith in due course of business and for an adequate consideration paid therefor. That your petitioners are the owners of certain other drainage warrants issued under and by virtue of act No. 16 of the session of General Assembly of Louisiana, approved 24th February, 1876, amounting to a sum in excess of $300,000, and which last mentioned warrants were also acquired by your petitioner in good faith, in due course of business and for an adequate consideration paid therefor.

That under and by virtue of the aforesaid statute No. 30, of 1871, and No. 16, of 1876, the entire amount of drainage assessment and drainage tax judgments referred to, in said act 30, 1871, particularly in section 9 of that statute, including the drainage assessment and drainage tax judgment against John Davidson and his succession, were especially set apart as a fund for the payment of all drainage warrants issued and to be issued under the aforesaid laws, including those held by intervenors; that said statutes constitute a contract in favor of intervenors and all holders of the said warrants and every part and portion thereof, and that under and by virtue of the statutes aforesaid, and by reason of the contract then established and created, the aforesaid holder and holders of the drainage warrants aforesaid, including those held by intervenors, acquired a vested right in and to every part and portion of the aforesaid drainage assessments for the payment of the entire amount of the drainage

warrants herein above referred to, and especially that part or portion of the drainage tax judgments as is due and owing by the succession of John Davidson, deceased, and by the plaintiffs herein; that the abandonment of the drainage work alleged in plaintiffs' petition, and any statute of the State of Louisiana, or any ordinance or resolution of the city of New Orleans, which might authorize an abandonment, and any actual abandonment, if permitted to carry with it, directly or indirectly, a cancellation of any part or portion of the drainage tax and drainage tax judgments herein above particularly referred to, or to relieve the drainage taxpayers' property, in whole or in part, from the payment of the drainage assessments and the drainage tax judgments aforesaid, would and so impair the obligation of the contract and divest vested rights created and established by the aforesaid laws, No. 30, of 1871, and No. 16, of 1876; that said abandonment, and the laws, ordinances, resolutions, and acts authorizing and causing the same, are in violation of article 110 of the constitution of the State of Louisiana for the year 1868, article 1, section 10, of the Constitution of the United States, and article 5 of the amendments to that Constitution.

And your petitioners further show unto your honors that acts 48 and 67, of the session of the Legislature of the year 1877, and act 148, of 1878, relied on by plaintiffs in the petition, also impair the obligation of a contract in favor of intervenors, and divest vested rights by them held, and that these laws are in violation of Art. 1, Sec. 10, of the Constitution of the United States, and Art. 5 of the amendments to said Constitution, and article 110 of the constitution of Louisiana for the year 1868, and must be entirely ignored and disregarded by the court. The premises considered, your petitioners pray for leave to intervene in this suit, and leave being granted, they further pray that plaintiffs and defendants herein may be cited to appear and defend themselves against this intervention, and that in due course of law it

may be ordered, adjudged, and decreed that the above assessment of the drainage work alleged by plaintiffs, and any law ordinance, resolution, or act, underlying such abandonment, and also acts 48 and 67, of the year 1877, and act 148, of 1878, may be decreed to be in opposition to the organic laws of the State of Louisiana and the Constitution of the United States, and entirely without the slightest force or effect; that plaintiffs' injunction restraining the execution of the judgment of the supreme court of the State of Louisiana, affirmed by the Supreme Court of the United States, and rendering these judgments nugatory and void, by the judgment of this court may be dissolved and set aside; that plaintiffs and their surety upon the injunction bond may, on account of the improper issuing of the writ of injunction, be condemned to pay damages and interest as authorized and required by law, and that intervenors may have and receive the costs, together with general relief in the premises.

(Signed) FRANK N. BUTLER,
Attorney for Intervenors.

Plaintiffs' Exception to the Intervention (p. 57).

Plaintiffs in the original suit except the intervention of John Crossly & Sons, limited:

(1.) Because they do not state whether they are a partnership, and, if so, who are the members of the firm, or, if a corporation, they do not so allege, or annex or exhibit any act of incorporation.

(2.) They do not set forth with any particularity or certainty the dates, numbers, or amounts of the drainage warrants which they allege they own, and on which they base their rights to intervene. Wherefore plaintiffs in the original cause pray that the said intervention be dismissed with costs.

(Signed) B. R. FORMAN,
Attorney for Plaintiffs.

On a motion and order for oyer, intervenors filed three drainage warrants, each for $2,000 (p. 62), and filed a supplemental petition setting forth more particularly their organization as a limited-liability company (pp. 59–61), not now necessary to copy or print. The plaintiffs in suit, reserving the foregoing exception to the intervention of John Crossly & Sons, plead the general issue to this intervention (p. 77).

The answer of the city of New Orleans (p. 78) avers she is not aware of the matters alleged by intervenors, and prays strict proof thereof in court; and on these pleadings the cause went to trial in the State district court, and the judge of that court decided in favor of plaintiffs on grounds other than the Federal question raised, as appears by the following:

Statement of Facts found by the State District Court, and expressly approved by the State Supreme Court. (*Record, pages* 271 *to* 277.)

"I find the following facts established in this case:

"1st. That plaintiffs are the owners of the real property in the first drainage district, described in the statement marked A, of which the dimensions are given in the first column, the number of the square in the second, boundaries in the third, assessed value of each piece in the fourth, the amount of the drainage tax in the fifth, and purchase price in the sixth column.

"2d. That each drainage district is susceptible of reclamation independently of the other districts prescribed by the act 165 of 1858, and that in point of fact the work done in other districts has not benefited the lands done in the first district. The soil of the first district from the river as far as Claiborne street having been reclaimed at their own cost by the authors of the present proprietors, and that between Claiborne and Metairie ridge having

been drained by the old draining company organized in 1835, by means of contribution supplied by the landholders of that area.

"3d. The rate of drainage taxation in the first drainage district consists of three and three-tenths mills per superficial foot, and two mills per superficial foot in the others.

"4th. There are no bonds or debts outstanding under the amendatory act of 1859.

"5th. That in the proceedings instituted in the late seventh district court by the city of New Orleans, entitled, 'In the matter of the commissioners of the first drainage district, praying for the homologation of the assessment roll,' etc., which resulted in the judgment of the supreme court, reported 27 Louisiana Annual, p. 20.

"(a.) Henrietta Davidson, executrix alone, was a party, and none other of the present plaintiffs.

"(b.) That the sole consideration and predicate of said decree was the prospective benefit to accrue to the landed proprietors by the proposed execution of the projected work and the resulting enhancement of the value of the lands to the extent at least of the amount levied upon it.

"Any other interpretation of said decree leads to a flagrant violation of the equitable principle, and the constitutional guarantee that private property shall not be taken for public use without adequate compensation to its owner.

"(c.) That whatever work has been done by the commissioners or the city has been a detriment rather than a benefit to plaintiff's lands, notably by the artificial obstruction of a bayou, thus impeding the natural drainage.

"(d.) That since the rendition of the judgment in question, (27 An., p. 20,) the plan established under the act of 1858 has been changed in important particulars, and the whole scheme of prospective reclamation, which was the *ratio*

existendi of that judgment, has been abandoned as futile and fallacious by the city with the sanction of the Legislature—the dredge boats and other improvements destined for drainage purposes having been sold in 1876, since which time not a blow has been struck in the way of work in any of the districts as contemplated by the acts 1858 and 1871, and the decree of the supreme court, invoked by the defendants and intervenors. That not one inch of plaintiff's lands has been benefited to the extent of one farthing by the work which should have been executed, and which has not been executed in consideration of the exorbitant and spoliatory contribution sought to be enforced from them.

"(e.) That the charter of the notorious Mississippi and Mexican Gulf Ship-Canal Company has been judicially forfeited for insolvency, and its assigns have entirely given up the work, or pretended work of drainage, and the city of New Orleans has not even attempted to prosecute the same for the last five years.

"6th. That all the labor expended in the first drainage district has been paid for in money or in premium bonds to the amount of three hundred and seventy-five thousand two hundred and ninety-five and twenty-five one hundredth dollars since the month of June, 1871. That drainage warrants to the amount of one million five hundred and forty thousand three hundred and twenty and seventy-five one hundredth dollars have been merged and funded in gold bonds, secured for their payment by an annual tax levy of five mills on the dollar of valuation of all the property within the city of New Orleans, of which the plaintiffs paid their share, by reason of which, if plaintiffs were cast in this suit, they would be subjected to a duplicate tax for one purpose.

"7th. That there are no drainage warrants outstanding for work alleged to have been executed in the first drainage

district, unless it be for the comparatively insignificant sum of $450, which represent to that extent the cost of permanently submerging the plaintiffs' land without affording an adequate measure of the damages they have suffered.

"8th. The seventh district court's homologation was of the tableau for the first draining district, the proceeds applicable to the drainage of the same, whereas intervenors' claim is based on work done in other districts, thus excluding the plea of *res adjudicata*.

"In the recently-decided case of the succession of Patrick Irwin (33 An., 63), the Supreme Court declared the nullity and unconstitutionality of act No. 30, 1871—a conclusion obviously irresistible, in view of article 144 of the constitution of 1868. Considering that the claims held by the city or by the intervenors arise under the act of 1871, so stricken with legal paralysis IT BECOMES UNNECESSARY THAT I SHOULD PASS UPON THE FEDERAL QUESTION OF THE DIVESTITURE OF VESTED RIGHTS OR THE QUESTION OF THE IMPAIRMENT OF THE OBLIGATION OF A CONTRACT. All the premises considered, I hold it to be against equity and good conscience, no less than a violation of law, to tolerate the enforced collection from plaintiffs of the exorbitant sums claimed, whether in the form of a privilege upon their estate or in the form of a personal judgment. The court will not remunerate a wrongdoer.

"Let the plea of *res adjudicata* be overruled.

"Let the demand in intervention be rejected with costs.

"Let there be judgment in favor of plaintiffs and against defendants as prayed for, and costs of suit.

"(Signed) N. H. RIGHTOR, *Judge.*"

Opinion and Decree of the Supreme Court of Louisiana (Record, p. 323), to which this Writ of Error is Prosecuted.

The object of this suit is to render inoperative a judg-

ment for drainage tax, and eventually to regulate its effect. The conspicuous features of the case presented by the record are the following:

In January, 1875, a judgment was rendered on appeal by the supreme court of this State, reversing that of the lower court, and approving and homologating the assessment roll presented in 1871 by the commissioners of the first district, the approval and homologation to operate as a judgment against the owner or owners thereof, with ten per cent. in addition to the amount assessed to pay costs and counsel fees. (27 La. Annual Reports, 21.) This judgment was affirmed by the Supreme Court of the United States, who did so, saying: "that there was no error in the judgment of the supreme court of Louisiana of which it has cognizance." (96 U. S., 97.) A piece of rural property known as the Allard place, was mentioned on said rolls as belonging to John Davidson. A tax of $40,253.85 was assessed upon it as due for the drainage of the same. Upon the complaint that the city of New Orleans, which had by law succeeded the commissioners, was about to take steps for the satisfaction of that claim out of said property, and of other property of theirs, and that said judgment had ceased to have any vitality for reasons stated, and could no longer be enforced, the widow and executrix and the heirs of John Davidson obtained an injunction arresting the writ, and prayed that it be made perpetual; that it be decreed that the city of New Orleans has no legal claim on any of their lands for drainage; that all inscriptions therefor be cancelled; and, if this relief be denied, that said claims be restricted to the specific property upon which it was assessed, and not to be a personal debt against any of them.

The city filed exceptions to the jurisdiction of the court, and pleaded *res adjudicata* and no cause of action. On appeal from a judgment dismissing this suit, this court disposed of the exception to the jurisdiction and of no cause

of action, and reserving the right of defendant to reiterate the other plea and to set up other defenses, remanded the case.

32 La. Annual Report, 1245.

Upon the remanding, the city renewed the plea of *res adjudicata*, and asserted the impairing the obligation of a contract alleged to have been formed touching the levy, collection, and application of the drainage tax claimed. John Crossly & Sons, representing themselves as owners of drainage warrants $688,695, whereof $368,695 was issued under act 30, 1871, and $320,000 under act 16, of 1876, of the General Assembly of this State intervened in this suit. They claim that the warrants were issued with an authority for legal consideration, and are secured for payment under the statute which constitutes a contract, the obligations of which could not be and were not legally impaired by any act of the State.

They claim no judgment either against the plaintiffs or against the city of New Orleans.

From a judgment in favor of plaintiffs, the defendant and the intervenor have appealed.

The grounds upon which plaintiffs seek relief appear to be six in number.

(1.) That all of petitioner's land in the first drainage district, between the Mississippi river and Metairie ridge, have been drained, and the expense thereof having been paid under the drainage statutes of 1835 and 1839, the subsequent assessment under the act of 1858 merged into the judgment enjoined, and is not legally exigible.

(2.) Thus, by act 165, of 1858, the assessment for draining any one section or district could not exceed $350,000, and payments of drainage tax having been made in excess of that amount, there is nothing due and exigible under the judgment aforesaid.

(3.) That the tax levied and imposed on the first drainage section for drainage purposes is greater in amount than the benefit to be derived by the owner of the assessed property from the drainage work. Taxation accompanied by such a result is tantamount to confiscation, and by reason thereof the tax is violative of the fundamental law, and so void.

(4.) That the drainage acts passed in 1858, 1859, 1861, and act 30, of 1871, levy and impose a drainage assessment not equal and not uniform, and therefore in violation of the constitution of Louisiana in force at the time those laws were enacted.

(5.) That the drainage for which the tax—underlying the judgment in controversy—was rendered has not been done, and that the scheme has been abandoned; that such abandonment works a cancellation both of this drainage tax and of the judgment for the same herein enjoined.

(6.) That the drainage assessment against the property of their author, John Davidson, and the judgment obtained therefor, have been released by acts 47 and 67, of 1877, and act 147, of 1878 of the General Assembly of the State.

In defense the city pleads that all these grounds, with the exception of those which relate to the non-performance and abandonment and to the release mentioned, were advanced in the opposition filed by the succession of John Davidson, represented by his executrix, to the proceedings for homologation of the drainage tax assessment roll or tableau; that they were directly passed upon by the supreme courts both of Louisiana and the United States, and that such judgment constitutes *res adjudicata;* that even if these grounds had not been specifically and fully set forth, they should have been thus alleged as they then existed and could have been set forth, and that they cannot be propounded after judgment.

The city of New Orleans further pleads and argues as concerns the additional defense of *abandonment* and *release* that the work was done as far as practicable; that there has been no abandonment on the part of the city, but merely a temporary suspension of operations wholly occasioned by the fault of the property owners in not paying their drainage tax; that an actual abandonment by the city would not have the legal effect of relieving the tax-payers of the drainage assessment and tax; that at the time of the pretended abandonment the Mississippi and Mexican Gulf Ship-Canal Co. and its transferees and holders of warrants issued by the company, had acquired a vested right to the entire tax levied in the several drainage districts; that such pretended abandonment, if supplemented by a release of the property owners from a payment of that tax, will impair the obligation of a contract and divest the valuable rights thus vested in the company and the parties referred to, and consequently that the alleged abandonment and the pretended cancellation of the drainage assessment must be treated as in violation of the fundamental law, and so absolutely void. From the view we have taken of the merits of this controversy, we do not think it necessary to pass upon the defense of *res adjudicata*. If it were sustained, the first four grounds relied upon by the plaintiffs could not be considered. If it were overruled, we would not adjudicate upon their sufficiency for relief, as there exists another ground upon which we can satisfactorily rest a decision of the case before us. The same view dispenses us from determining whether the judgment enjoined can or not be construed or regulated in its effect so as to be restricted in its enforcement to the property on which the drainage tax was assessed, and from which it is claimed that it should primarily be paid; in other words, whether this judgment be both real and personal or real only. For the same reason we are relieved from the obligation of considering and determining the effect of section 12 of act 165, 1858, as

well as that of acts 47 and 67, of 1877, and of act 147, of 1878, involved by plaintiffs for their further protection.

Conceding for argument's sake that the first four grounds of the petition and all other causes of complaint which existed and could have been set up at the date of the opposition to the drainage assessment roll, have been adjudicated upon, and that the judgment rendered constitutes an insuperable objection to their being agitated, it does not follow that the judgment is one which necessarily must be executed, or one which cannot be nullified, that is declared inoperative and of no effect. It is worthy of note that, in the opinion rendered in 27 Annual, 21, the court expressly refers to the memorable decision in 11 Annual, 370, which both parties from different standpoints invoke as a shield in this litigation for their respective protection. That opinion contains a most material reservation, which leaves a wide door open for resistance to the judgment in question. This suit is to have that judgment declared inoperative, because of what has occurred since it was pronounced, and which could not have been pleaded before it was rendered. As was said in our previous opinion: "It is easy to conceive that cases may arise in which causes occurring subsequently to the rendition of judgments may render their execution illegal and inequitable and violative of rights not within the contemplation of the court when the judgment was rendered, and not intended to be foreclosed thereby. Examples are suggested of the eviction of the vendee after judgment for the price or eviction of the tenant, or destruction of leased premises after judgment for future rents, and such examples might be easily multiplied. Here would be failure of the only possible consideration of such judgments, and it could not be doubted that such failure would furnish just ground to enjoin their execution." (See 13 A., 249; 3 A., 646; Story's Equity, §§ 887, 889.)

In its wisdom the Spanish law, once in force in this State, the spirit of which has survived intervening changes, and

still abides with us, expressly provides for such contingencies. On the subject of *res judicata* it declares that "if the parties have appealed from the judgment, and it is confirmed by the sentence of a competent superior tribunal, they shall be bound forever by it thereafter, yet if anything should happen to destroy its force it will cease to have effect either against the parties or their heirs." (Partidas 3, Tit. 22, law 19. (This principle is necessarily inherent in all legislation, particularly when the *consideration* of a judgment is prospective and must have inured as a condition precedent to its execution and enforcement. In the case in which the judgment invoked as *res adjucata* was rendered, the court formally declared that the constitutional questions raised had been decided in 11 Annual, 370. Referring to the opinion in that celebrated controversy we find that the court then used the following language:

"We have not understood from counsel that there are cases in which the property has not been so far benefited by the work done as to be increased in value more than the cost of the work assessed. Were not this the case the property of each proprietor to the extent of the difference between the increased value and the cost of the work assessed to him would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of Art. 105 of the constitution."

Now, in the present controversy it is claimed that the sole consideration of the judgment at stake was the prospective benefit to accrue by the contemplated executor of the projected work, and the consequent enhancement of the value of the land to the extent at least of the amount levied upon it; that whatever work has been done by the commissioners or the city has been a detriment rather than a benefit to the lands of plaintiffs; that the work has been abandoned and there is no probability it will be resumed;

that whatever taxes might be collected would go not towards the completion of the scheme, but to the satisfaction of the warrants in question; that all the labor expended in the first drainage district has been paid for; that there are no drainage warrants outstanding for the said work to have been done in the first district, except for the insignificant sum of $450; that the judgment of homologation was of the tableau for the first drainage district, the proceeds applicable to the same; that the claim of intervenors is under warrants issued for liabilities for other districts; and finally, in substance, the consideration of the judgment having failed, it cannot be enforced. We have considered the statement which the district judge has systematically made of FACTS found by him; we have compared it with oral and written evidence introduced on the trial of the case, and we find that the averments made by the plaintiffs are established touching the absence of any benefit derived from the contemplated drainage; injury sustained in consequence of what work was done; the nature and condition of their property, which is entirely and always under water, a place of resort for water-fowl, hunting and fishing, the absence of any outstanding warrants for work of any kind done in the first draining district (except for a small amount), the abandonment of all drainage work, the disposal of all drainage apparatus, the impotency of the city to resume the enterprise, the value of the property on which the TAX IS ASSESSED, WHICH IS SHOWN TO BE AT BEST ONE-TENTH OF THE AMOUNT OF THE CLAIM, with charges superadded. In presence of such a state of facts, can it be insisted in in good conscience and in equity that the judgment enjoined shall be enforced? In answer, we are confronted with the saying of our immediate predecessors in the Canal Bank *vs.* New Orleans, (30 A., 1376,) wherein they asked whether they were to consider as conclusive evidence the declarations contained in the acts of 1877, that would be sufficient to establish that the work contracted for and

done has not been performed at all, or not performed according to the terms of the contract, and that every outstanding warrant given as the price of that work is without consideration? In answer to the formal question put by themselves, viz., "Would these declarations, if taken as evidence, be sufficient to justify the court to pronounce in this suit that in whosesoever hands these warrants may have passed they are invalid and void, worthless as to the creditors, binding on no one, and that every guarantee, mortgage, and privilege securing their payment, must be cancelled, erased, and destroyed?" they have answered, "We think not," (30 and 1376.) The suit wherein this language is found was one in which the plaintiff was asking the reimbursement of a sum of money paid without compulsion as a drainage tax. The ground of repetition was want of consideration and subsequent release from the tax and all liability, by the legislation of 1877, previously noticed. The court did not stop there; they ended the opinion by saying: "We conclude that plaintiff has not shown that its drainage taxes were levied and paid without consideration, and that it was shown, in so far as defendant is concerned, that said taxes were voluntarily paid and properly disposed of."

The warrant-holder who had intervened was dismissed on the ground that, as no judgment susceptible of being rendered could affect him, he had no foundation upon which to stand, and therefore no interest to assert and to protect in that litigation.

The putting and answering of the question were uncalled for. The matter was not discussed. It was not necessary to consider it at all, for the determination of the issue presented, which was merely the return now to the plaintiff of a sum of money willingly paid as a drainage tax, the ground of the repetition being, as already observed, want of consideration. The language used on the occasion must, therefore, be taken merely as *obiter*.

Under the authority in 11 Annual, 370, which underlies the rulings in 27 Annual, 21, we are of a different opinion, and consider that when the consideration of a judgment is prospective, and has failed, the eventual debtor is, both in law and equity, entitled to relief, and the consequent exoneration.

That authority and the conclusions to which we have arrived are supported by text writers and a long line of decisions in a number of our sister States, declaring assessments void because the benefit to the property could not have been seen and traced. In all the cases in which it was clear that the district had received no benefit the courts have without hesitation interfered. On this subject Mr. Cooley, in his work on taxation, says: "The levy is made on the supposition that the estate having received the benefit of a public improvement, ought to relieve the public of its expense. In such a case, if the owner can have his land taken from him for a supposed benefit to the land, which, if the land is sold for the tax, it is thus conclusively shown he has not received, and he then be held liable for the deficiency in the assessment, the injustice, not to say the tyranny, is manifest."

Cooley on Taxation, 471–3.

Mr. Burroughs, in his treatise on the same subject, writes more pointedly:

"If there can be a personal assessment or the owner can be made personally liable for the tax thus imposed, then we have the remarkable result that for a tax which is imposed on a lot of land upon the theory that its pecuniary value *is increased* by the improvements; the lot may be sold, and if there is a deficiency the owner may be required to pay it, or in other words, for the benefit conferred on the property, the property may be confiscated, and the owner for the privilege of having it confiscated may be

required to pay a tax into the treasury of the city." Burroughs on Taxation, p. 475; vide p. 38, §§ 30, 39; p. 459, §§ 145, 146, 147; pp. 466, 474; 31 Cal., 249, 254; 41 Cal., 525; 49 Cal., 546; 41 N. Y., 123, 126, 133; 36 Mo., 456; 50 Mo., 525; 56 Mo., 286, 356; 58 Penn., 320; 1 Gill, 480; 5 Gilman, 416; 59 Maine, 8; 3 Bush, 416, 423, 667; 4 Bush, 587; 24 Ill., 203; 24 Miss., 497.

Finding such to be the case in the present controversy, we concur with our learned brother of the district court in the conclusions which he has reached in favor of plaintiffs. As the judgment sought to be executed by the city has become inoperative, and so cannot be enforced, and as the claim of the intervenors hinges and is contingent upon that of the city, the unavoidable consequence is that the intervention must fail with the main defense, asking the execution of the judgment enjoined.

We say that the claim of the intervenors is based upon that of the city, for the reason which they themselves aver in their pleadings and assert in argument, that under the laws by virtue of which the warrants were issued, and also of the intervening constitutional amendment of 1874, they can only be paid out of the drainage taxes realized.

If the statutes and the amendments constitute a contract in their favor, it is one which by its very terms is subordinate to the collection of drainage taxes legally due and exigible.

When no such taxes are demandable, the contract, whatever it be, and the rights averred under it, necessarily falls through. There exists a marked disparity between the present case and that of the State of Louisiana, *ex rel* Martin *vs.* Police Jury, Caddo Parish, (32 A., 1022,) to which our attention has been called by the learned counsel of defendant and intervenors. In that case bonds had been issued, with legislative sanction, in exchange for scrip and evidences of parochial indebtedness emitted for consideration, but without legal authority. They had been made

payable by the parish in a manner indicated, but without restriction as to the source of payment. Hence, on the refusal of the municipal authorities to levy the tax provided by the law, and asked by the bondholders, a mandamus was allowed.

In the present instance, if the warrants held and produced on the trial by the intervenors for the amounts before stated be legal and valid under the statute of 1871 and that of 1876, and the constitutional amendment of 1874, the last act resting on the former and on the amendment, no provision of subsequent law has been referred to directing them to be paid in a manner different from that mentioned in the statutes and in the amendment. The payment of these warrants is therefore to be regulated by the provisions of the authority under which they were issued, and that authority expressly confines it exclusively to a special fund, when realized, and if realized, it is to take place only from the drainage assessments or taxes, and not otherwise. The payment was, therefore, to be completely hypothetical, contingent upon eventualities susceptible of happening or not, and was restricted by well-defined limitations. The want of analogy between the two cases is manifest, both as to the law and the facts, which, charging an impairment of their alleged contract, the intervenors cannot be heard to ask to be permitted to assail and destroy its integrity by demanding over and above that which may have been covenanted. (33 A., 386.)

Their contract, if it exists, and whatever it be, is the law controlling their rights. It is therefore ordered and decreed that the judgment appealed from be affirmed with costs.

Rehearing refused. (Tr., p. 340.)